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TRANS-POLAR AVIATION AND JURISDICTION OVER ARCTIC AIRSPACE*

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Current press articles and periodical literature, both in the United States and abroad, are manifesting a developing interest in trans-polar aviation and Arctic aërial jurisdiction. Although this interest in Arctic airspace appears to be conceived in the exigencies of the present world conflict, belief in the practicability of air routes traversing the Arctic Basin and joining the great centers of civilization of the two hemispheres was expressed as long ago as shortly after the First World War. Perhaps most vocal of the exponents is the polar explorer and publicist Vilhjalmur Stefansson, who began to stress the positional significance of the Arctic almost twenty years ago.[1]

Meanwhile the feasibility of polar aviation was demonstrated in actual practice.[2] Following a series of experimental flights by dirigible and plane—and once the urge to attain the North Pole via the air materialized in the successful flights of Richard E. Byrd, Roald Amundsen-Lincoln Ellsworth, and Umberto Nobile in 1926 and 1928—polar flying concentrated largely upon the spanning of the Atlantic and Pacific aërial highways between the two hemispheres.

* All assertions and opinions presented herein are purely those of the author and are in no wise to be construed as official or reflecting the views of the Navy Department or the naval service in general.

[1] *The Adventure of Wrangel Island* (N. Y., 1925), *passim*, and "The Resources of the Arctic and the Problem of Their Utilization," in W. L. G. Joerg (ed.), *Problems of Polar Research* (N. Y., American Geographical Society, 1928).

[2] For good summaries of the development of polar flying, see Joerg, *Problems of Polar Research*, and *Brief History of Polar Exploration Since the Introduction of Flying* (N. Y., American Geographical Society, 1930); and J. Gordon Hayes, *The Conquest of the North Pole; Recent Arctic Exploration* (N. Y., 1934).

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During the later 1920's, the trans-Atlantic route via Greenland and Iceland was successfully bridged, and in the later 1930's interest centered upon flights between Europe and the United States via the trans-Pacific segment of the Arctic, culminating in a series of spectacular Arctic flights between Western Russia and our Western coast.

Recent improvements in aviation have centered attention upon the regularization of postwar commercial air traffic along the great circle routes of the Arctic. Chief of the advantages to be derived from the establishment of such routes are the important savings in both mileage and time. By way of illustration, the distance between New York and Moscow is about 1,000 miles shorter via the Far North than it is by established steamship and railroad routes. From San Francisco to Bergen, the distance is some 2,000 miles shorter; while 6,000 miles are saved along the polar route from London to Tokyo. As far as the saving in time is concerned, at 300 miles an hour—which may not be an unreasonable postwar rate of speed—transports can easily carry their passengers and cargoes between Berlin and Tokyo, Chicago and Moscow, Montreal and Igarka, New York and Berlin or Moscow, and San Francisco and either London or Tokyo in less than half the time it takes a crack train to make a non-stop run from New York to San Francisco at eighty miles an hour. Planes also can bridge the gaps between New York and Chungking, Minneapolis and Bombay, or New York and Tokyo in considerably less time than the special express train will require to cross our country. At 300 miles an hour, wherever one may happen to be, no spot on the once wide globe is farther away than forty-two flying hours.

The impact of such striking factors of air geography is materially clarified by cartographers, who recently designed the so-called "polar projection," prepared by laying a geometric plane on the Pole at right angles to the earth's axis, and depicting the globe with the North Pole as the center and with the South Pole as the outer circumference. As a result, the northern continents surround the central Arctic Basin and the Antarctic Continent represents an outer lacy fringe. The significance of this projection lies in the ease with which rectilinear air routes between all points of the globe can be observed.[3]

[3] This polar projection is briefly explained and graphically illustrated in "Maps —Global War Teaches Global Cartography," *Life*, Aug. 3, 1942, pp. 57–65, and

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The realization of the potentialities of future polar flying naturally impels writers and governments to pay augmented attention to the legal aspects of aërial jurisdiction in the Arctic Basin, and also to the claims made to the appropriable landed areas that remain in the Far North. The latter are of considerable importance because the establishment of trans-polar aërial communication doubtless will necessitate possession of the territory essential to the construction of flying lanes, landing bases, and radio and meteorological stations. The race for the control of this territory and its superjacent airspace therefore appears to be very close at hand. The time, consequently, is ripe for a consideration of the principles of international law which govern aërial jurisdiction, particularly in these areas.

I. CONVENTIONAL AIR LAW

With the advent of aëronautics, it was found that a new field of international jurisprudence was necessary. Originally, it seemed possible by analogy to apply the established rules governing jurisdiction over land and sea, but in time it became apparent that aircraft require a special code of laws and a new means of international regulation.[4]

The actual establishment of acceptable general aërial rules of international law dates back only a few years. As a matter of fact, thirty years ago, prior to the First World War, there was no accepted international air law as we speak of it today,[5] despite the fact that the matter was given some consideration in far earlier times, when air was considered of little navigational or commercial importance. Justinian law declared the air, like the high seas, to be free to all mankind,[6] while a contrary principle of the Roman Civil Law recognized the lord of the soil also as lord of the heavens. With certain limitations and modifications, the latter interpretation appears to have been revived in the later Middle Ages and brought down to modern times and incorporated into the Common Law

is utilized in the preparation of several current maps, such as the Insert in *Fortune* (Mar., 1942) and the wall chart *Polar Aëronautical World*, ed. by Glenn T. Trewartha and published by A. J. Nystrom and Co. (1942).

[4] Kenneth W. Colegrove, *International Control of Aviation* (Boston, 1930), p. 40.

[5] Carl Zollmann, *Law of the Air* (Milwaukee, 1927), p. 1.

[6] Simeon E. Baldwin, "The Law of the Airship," *Amer. Jour. of Internat. Law*, Vol. 4, p. 95 (1910).

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by Coke and Blackstone.[7] These two views, supplemented by a number of variations, have formed the core of recent discussion concerning aërial jurisdiction. French thinkers have largely taken the lead in the assertion of freedom of the air, whereas the British have rather stood for jurisdiction over airspace.[8] The debate is essentially one of unlimited navigation versus self-preservation and protection of national welfare.

Prior to World War I,[9] the opinion that the "high air," like the high seas, should be open to the navigation and commerce of all peoples—a principle apparently substantiated by analogies drawn from existing international law governing rights of innocent passage through territorial waters—was upheld at the Ghent session of the Institute of International Law in 1906. Based upon the proposal of Fauchille, the Institute thus agreed that the air is free, and that, in time both of peace and of war, states possess only those rights necessary for their self-preservation.[10] An International Conference on Air Navigation was convened by the French Government at Paris in 1910 for the purpose of preparing rules for aërial navigation, but the effort proving unsuccessful, the conference soon adjourned.[11] Again, despite the passage of resolutions embodying a constructive program of legislation by the International Law Association at its Madrid meeting in 1913, no action was taken by the national governments.[12]

Upon the outbreak of the First World War, however, the theory of the free "high air" was disregarded. In keeping with their national legislation,[13] belligerent states asserted full jurisdiction over the air above their territory as a matter of national defense. At the

[7] Amos S. Hershey, *The Essentials of International Public Law and Organization* (N. Y., 1930), pp. 340, 341; George Grafton Wilson, *Handbook of International Law* (St. Paul, 1927), p. 77. [8] Colegrove, *op. cit.*, pp. 5, 6.

[9] A host of pre-war conferences are listed in Laurence C. Tombs, *International Organization in European Air Transport* (N. Y., 1936), p. 4, n. 4; for an account of the work and achievements of these conferences, see Colegrove, *op. cit.*, Chap. 3.

[10] James Brown Scott, *Resolutions of the Institute of International Law* (N. Y., 1916), p. 164.

[11] William E. Hall, *A Treatise on International Law* (Oxford, 1924), p. 205.

[12] Charles G. Fenwick, *International Law* (N. Y., 1924), pp. 287, 288.

[13] A study of this legislation—including the laws of Austria (1912), France (1911, 1913), Great Britain (1911, 1913), Italy (1914), Prussia (1910)—indicates that the doctrine of freedom of the air has attained little headway with the governments, all of which made the most unequivocal claim to absolute jurisdiction over the airspace above their territory. Colegrove, *op. cit.*, p. 46.

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same time, neutral states, desiring not to be found wanting in the fulfillment of their neutral obligations, refused to accord belligerent airplanes the right to pass through the airspace superjacent to their territories. By the close of the war, the jurisdiction of a state over the airspace above its territory appeared to be settled as a matter of state practice.[14] At Versailles, there consequently was a genuine and widespread conviction of the necessity of laying down a basis of public air law and of regularizing the conditions under which aircraft can be employed in international commerce.[15]

The attitude that the air is not free, but rather is subject to jurisdictional control, was incorporated into the Convention for the Regulation of Aërial Navigation, drawn up by the Aëronautical Commission of the Peace Conference in 1919.[16] Contracting states thereby recognize complete and exclusive jurisdiction in the airspace above the landed territory and territorial waters of a state, but agree in time of peace to accord freedom of innocent passage to the aircraft of the other contracting states who observe the conditions prescribed in the Convention, with the reservation that any state has the right of prescribing prohibited areas for military reasons or in the interest of public safety. Every aircraft of a contracting state has the right to cross another state without landing, but all are required to follow the routes fixed by the state flown over, and the establishment of international airways is subject to the consent of the states flown over. Upon the departure or landing of an aircraft, the authorities may visit the aircraft and verify all of the documents with which it must be provided. Military aircraft are not permitted to fly over another state without special authorization, and when so authorized, they are to enjoy, in principle, the privileges which are customarily accorded foreign ships of war.[17]

This Convention was an effort to establish a global law of aviation, and it has since served as a basis of international conventional law.[18] Its principles were embodied both in the Madrid Ibero-American Convention of November 1, 1926, signed by twenty-one states, including Spain, Portugal, and the nineteen Latin American

[14] Fenwick, *op. cit.*, p. 288; also see Naval War College, "Jurisdiction and Polar Areas," *International Law Situations, 1937* (Wash., D. C., 1939), Situation 3, p. 125.

[15] Tombs, *op. cit.*, p. 8.

[16] For the text of the 1919 Convention, see *Amer. Jour. of Internat. Law*, supp., Vol. 17, pp. 195–215 (1923).

[17] Arts. 1, 2, 15, 21, 32.

[18] Manley O. Hudson, "Aviation and International Law," *Amer. Jour. of Internat. Law*, Vol. 24, p. 231 (1930).

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Republics,[19] and in the Havana Pan-American Convention on Commercial Aviation, signed on February 20, 1928, by the American Republics at the Sixth International Conference of American States.[20]

By way of preparation for the latter, among the projects of international law conventions, undertaken at the request of the Governing Board of the Pan-American Union and adopted by a committee of the American Institute of International Law which was designated at the Lima meeting for this purpose, was also one on aërial navigation. It provides that every American state shall have complete and exclusive jurisdiction over the airspace above its territory, that each American Republic shall undertake in time of peace to accord freedom of innocent passage to other American states, and that each American state shall be permitted to prohibit flight over certain areas of its territory.[21]

In 1930, when states were requested to express opinions upon various principles to be considered at the pending Hague Conference on the codification of law regarding territorial waters, a majority of maritime states agreed that a coastal state possesses jurisdictional rights over the airspace above its territorial waters. The Committee on Territorial Waters at the Conference recommended the selfsame principle.[22]

In addition to this growing multilateral legislation, a large number of bilateral air agreements have been concluded, largely between states which have remained outside the general conventions, or between a state which is a party to one of these instruments and a state not a party thereto. Since these bilateral agreements usually are based upon the same principles to be found in the multilateral conventions, they help to crystallize the principles of air law into international usage, although they are admittedly of more limited importance than are the general agreements.[23]

The 1926 United States Air Commerce Law,[24] and most recent

[19] Manley O. Hudson, *International Legislation*, III, 2019. [20] *Ibid.*, IV, 2356.

[21] *Codification of American International Law* (Wash., D. C., 1925), project no. 20, pp. 68–76; *Amer. Jour. of Internat. Law*, supp., Vol. 20, pp. 340–347 (1926).

[22] Art. 2; *Amer. Jour. of Internat. Law*, supp. Vol. 24, pp. 184, 239 (1930).

[23] Hudson, "Aviation and International Law," *loc. cit.*, p. 236. For a list of these treaties to 1930, see *Amer. Jour. of Internat. Law.*, supp., Vol. 24, pp. 161–168 (1930); and for a critical discussion of the subject (see Tombs, *op. cit.*, Chap. 5), which includes a list of bilateral agreements to 1935, pp. 101, 102.

[24] *44 U. S. Statutes at Large* 568 ff., especially sec. 6, p. 572.

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legislation of other states, also embodies the essential principles prescribed in these conventions and agreements.[25] It may be concluded, therefore, that the Convention of 1919 has considerably influenced national, bilateral, and multilateral public air law,[26] and that resulting international law clearly recognizes rights of jurisdiction over airspace as accruing to the subjacent state.

II. OPINIONS OF THE JURISTS

The course of opinion held by thinkers in the field of international law has followed much the same course as that taken by the international law organizations and international conferences. In their writings there is also discernible an historical trend from the doctrine of the free "high air" to that of jurisdictional control. But the publicists have supplemented these contradictory policies with a number of intermediary theories.

Chronologically, the first interpretation of the writers is that the air is absolutely free.[27] This theory is founded upon the Roman maxim that the air, like the seas, is *res communis* (as distinguished from *res nullius*), and upon the analogy between the air and the high seas.[28] This is the view held by the older writers such as Bluntschli, Pradier-Foderé, Stephen, and Wheaton, and by some recent jurists like Nys.[29]

The second theory, just the opposite, is that the subjacent state has an absolute right of sovereignty over the entire superincumbent aërial domain, which, according to the late Professor James W. Garner, is advocated by Bellot, Collard, Franz von Liszt, Lycklama a Nijeholt, Martitz, J. E. G. de Montmorency, J. M. Spaight, E. von Ullmann, and Zitelmann.[30]

Intermediate interpretations admit neither absolute freedom nor complete jurisdiction. The third theory thus suggests that the air is free, subject to certain rights of control for purposes of protection and conservation up to certain altitudinal heights. This is frequently referred to as the theory of "air zones," according to which there are said to be two air zones, the lower being nationalized while

[25] Manley O. Hudson, *Cases and Other Materials on International Law* (St. Paul, 1936), p. 392. [26] Tombs, *op. cit.*, p. 52.

[27] James W. Garner, *Recent Developments in International Law* (Calcutta, 1925), p. 145.

[28] T. A. Taracouzio, *The Soviet Union and International Law* (N. Y., 1935), p. 71.

[29] Garner, *op. cit.*, p. 145. [30] *Ibid.*

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the upper is free.[31] It has been stated that this proposal draws its analogy from the three-mile zone of territorial waters.[32] The following writers are its proponents: von Bar, Despagnet, Fauchille, Gareis, Holtzendorff, Merignhac, Meyer, Rivier, Rolland, Oppenheim, and Hazeltine.[33]

The fourth theory, which argues that states possess aërial jurisdiction, subject to certain limitations, has been adopted by a majority of recent writers, and is in accord with state practice since World War I. Among the writers expressing this point of view may be listed the following: S. E. Baldwin,[34] Charles G. Fenwick,[35] Amos S. Hershey,[36] Manley O. Hudson,[37] Charles Cheney Hyde,[38] Ellery C. Stowell,[39] George Grafton Wilson,[40] and Carl Zollmann.[41] In addition, Garner cites Grünwald, Holland, Meurer, and Westlake.[42]

III. CONTEMPORARY PRINCIPLES OF AËRIAL JURISDICTION

To summarize, the following are the basic principles of international air law developed by convention and in the writings of the publicists. First, legislation since World War I indicates that, aside from the limitations of convention, there is no obligation for any state to permit the aircraft of other states to fly over its landed territory or territorial waters.[43] Second, by way of contradistinction, it is now generally admitted that the airspace above the high seas is free and that no state has any right of control over it.[44] Third, although prior to the First World War it seemed as though the principle of innocent passage might be adopted into international usage, it has since become evident that no matter how high aircraft may fly, a state nevertheless possesses authority to forbid and prevent any flight over its territory.[45] According to Article 2

[31] Taracouzio, *The Soviet Union and International Law*, p. 71.
[32] Zollmann, *op. cit.*, p. 2. [33] Garner, *op. cit.*, p. 146.
[34] "The Law of the Airship," *loc. cit.*, p. 96.
[35] *Op. cit.*, p. 288. [36] *Op. cit.*, pp. 340, 341.
[37] "Aviation and International Law," *loc. cit.*, pp. 238–240.
[38] *International Law* (Boston, 1922), I, pp. 326 ff.
[39] *International Law* (N. Y., 1931), p. 58. [40] *Op. cit.*, pp. 117, 119.
[41] *Op. cit.*, p. 3. [42] *Op. cit.*, p. 146.
[43] Jurisdiction of a littoral state over the airspace superjacent to its maritime waters was acknowledged at the 1930 Hague codification conference; see "Hague Codification of International Law: II. Territorial Waters," *Amer. Jour. of Internat. Law*, supp., Vol. 24, p. 240, art. 2 (1930).
[44] Naval War College, *op. cit.*, p. 127.
[45] Hudson, "Aviation and International Law," *loc. cit.*, p. 238.

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of the 1919 Convention, if certain conditions are observed, freedom of innocent passage is granted as a *privilege*, instead of being accorded as a *right*.[46] Despite the fact that landlocked states, such as Austria, Bolivia, Czechoslovakia, Hungary, Paraguay, and Switzerland, are likely never to accept a doctrine of absolute jurisdiction without this right of innocent passage,[47] state practice definitely tends in the opposite direction. Hazards of aviation are so great and danger to persons on land is so imminent that states are unwilling to limit their power to exclude and control the planes of foreign states.[48] In time of war, the reason for such exclusion is obvious. Even in time of peace, the United States virtually denies the interstate navigation of non-American planes.[49] In bilateral agreements, states usually concede freedom of innocent passage in time of peace, but with the reservation that the frontiers may be crossed only at certain points.[50] It therefore may be concluded that no freedom of transit over foreign territory exists as a matter of right, but only by convention.

Finally, the airspace, like the water-covered areas of the world, constitute *res communis* (under the concurrent jurisdiction of all states), rather than *res nullius* (belonging to no state). Most writers overlook this question in their analyses of aërial jurisdiction;[51] but, applying the same reasoning as that utilized in connection with water-covered areas, the airspace is under the common jurisdiction of all states. In other words, no part of the aërial domain is subject to acquisition by effective control and occupation, even if it were possible to do so physically. True, such control might be exercised at the points of landing of aircraft; but long-range planes can today traverse thousands of miles without landing for fuel or repairs. As with territorial waters, jurisdiction consequently is founded upon international agreement and usage.

If airspace did constitute *terra nullius*, the aërial limits of a state

[46] Tombs, *op. cit.*, p. 53.

[47] Blewett Lee, "Freedom of the Air in the United States," *Amer. Jour. of Internat. Law*, Vol. 25, p. 247 (1931).

[48] Hudson, "Aviation and International Law," *loc. cit.*, pp. 238, 239.

[49] Air Commerce Act of 1926, sec. 6(c), *44 U. S. Statutes at Large*, 572.

[50] Tombs, *op. cit.*, pp. 102, 103.

[51] Edouard d'Hooghe, formerly president of the International Juridical Committee of Aviation, *Droit Aérien* (Paris, 1912), is one of the few writers who are cognizant of this status; cited in J. M. Spaight, *Aircraft in War* (London, 1914), p. 140.

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would not necessarily coincide with those of its landed and water domain. It would not then be impossible for a state to claim an air zone far beyond the limits of its territorial waters, assuming that it could control effectively the area so circumscribed. But in both multilateral and bilateral agreements, and in their municipal legislation, the states have universally recognized the coincidence of these limits of maritime and aërial jurisdiction. The airspace above the high seas has been recognized as belonging to the jurisdiction of no state, and therefore it cannot be acquired juridically by any acts of occupational control.

IV. AËRIAL LAW IN THE ARCTIC

As is true of landed territory and water-covered areas, the principles of law concerning jurisdiction over airspace must be the same for the polar regions as in other portions of the globe, unless some special provision is made by universal agreement through continuous usage or by general convention. Since neither of the latter has occurred, the jurisdictional rights of polar states in the Arctic are necessarily founded upon the juridical principles outlined above.

But a recent school of thought has developed the theory of polar "sectorism," propounded ostensibly for the solution, in advance, of problems of polar jurisdiction. According to this theory, each subjacent Arctic state automatically possesses full jurisdiction over all territory and airspace within the area to the north of its mainland lying between its longitudinal extremities converging at the Pole. Thus, geographically, an Arctic sector is a triangular slice of the globe, with its apex at the Pole, bounded along the sides by two meridians of longitude, and usually having a territorial coastline as its base.[52]

By and large, the sectorists delineate six such Arctic sectors, one belonging respectively to Norway (Spitsbergen and Jan Mayen Island), Finland, the U.S.S.R., the United States (Alaska), Canada, and Denmark (Greenland and Iceland). Since the poleward exten-

[52] Charles Cheney Hyde "Acquisition of Sovereignty Over Polar Areas," *Iowa Law Review*, Vol. 19, pp. 289–292 (1934); Naval War College, *op. cit.*, p. 116; Gustav Smedal, *Acquisition of Sovereignty Over Polar Areas* (Oslo, 1931), p. 54; Vladimir Leont'evich Lakhtine, *Prava na Severny Poliarny Prostranstva* (Moscow, 1928), pp. 37, 38, as cited in T. A. Taracouzio, *Soviets in the Arctic* (N. Y., 1938), p. 321. Lakhtine's study was rewritten in English under the title "Rights Over the Arctic," *Amer. Jour. of Internat. Law*, Vol. 24, pp. 703–717 (1930).

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sion of the Finnish longitudinal boundaries is interrupted by the Spitsbergen Archipelago, some sectorists eliminate Finland from this list.

The sector principle originally was propounded on February 20, 1907, by Canadian Senator P. Poirier, who envisioned sectors for Norway, Russia, the United States, and Canada.[53] Eighteen years later, the American publicist David Hunter Miller sliced the Arctic into three sectors—Russian, American, and Canadian.[54] Following the 1926 Soviet sectoral decree, which is more fully described below, a number of Soviet writers assumed the major brunt of the case for the principle. Its chief exponents are E. A. Korovin,[55] Leonid Breitfuss,[56] Vladimir Leont'evich Lakhtine,[57] and S. V. Sigrist.[58] These were rapidly followed by a number of other writers, including the German geographer Ernst Sorge,[59] Professor Bruce Hopper,[60] and the Canadian writer D. M. LeBourdais.[61] These latter, however, appear to accept the principle without attempting to justify its validity. It is interesting to note that while all of these exponents pretend to interpret the same juridical principle, they

[53] Dominion of Canada, Senate Debates (1906–1907), p. 271. Although sectorism was subsequently relied upon by a number of Dominion officials, the Government of Canada has never based the legality of its pretensions to polar territory upon it, and neither the Canadian Parliament nor the Foreign Office has yet declared or implied its adherence to the principle.

[54] "Political Rights in the Arctic," *Foreign Affairs*, Vol. 4, pp. 47–60 (Oct., 1925). This study was combined with another on "National Rights in the Antarctic," *Foreign Affairs* (Apr., 1927), Vol. 5, pp. 508–510, and was then published as "Political Rights in the Polar Regions," in Joerg, *Problems of Polar Research*, pp. 235–250.

[55] "Problema vozdushnoi okkupatsii v sviazi s pravom na poliarnye prostranstva" (Problems of Aërial Occupation in Connection with Rights in the Arctic), *Voprosy Vozdushnogo Prava*, 1: 104 ff.; "S. S. S. R. i Poliarnye Zemli" (The U. S. S. R. and the Land in the Arctic), *Sovetskoe Pravo* (1926) 3: 43 ff.; and "S. S. S. R. i Severnyi Polius" (The U. S. S. R. and the North Pole), *Sovetskoe Pravo*, Vol. 3, no. 3 (1929).

[56] "Die territoriale Sektoreneinteilung der Arktis im Zusammenhang mit dem zuerwartenden transarktischen Luftverkehr," *Petermanns Mitteilungen* (1928) 74: 23–28; translated by M. B. A. Anderson and R. M. Anderson as "Territorial Division of the Arctic," *Dalhousie Review*, Vol. 8, pp. 456–470 (Jan., 1929).

[57] Lakhtine presented his idea at greater length in *Prava na Severnye Poliarnye Prostranstva*, and in a summarized form in "Rights Over the Arctic," *loc. cit.*

[58] "Sovetskoe Pravo v Poliarnykh Prostranstvakh" (Soviet Law in the Arctic), *Rabochii Sud* (1928), p. 984 ff.

[59] "Die Arktis," in Fritz Klute (ed.), *Handbuch der Geographischen Wissenschaft* (Potsdam, 1933), Chap. 8, pp. 496–543.

[60] "Sovereignty in the Arctic," *Research Bulletin on the Soviet Union* (Aug. 30, 1937), II, no. 8, pp. 81–83.

[61] "Canada's New Front Door," *Canadian Magazine*, Vol. 89, p. 9 (Mar., 1938).

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cannot agree on the allocation of the sectoral lines and the number and size of the sectors. As a matter of fact, there is very little agreement even among the Soviet authorities, except as far as the Canadian sector is concerned.

Despite this acceptance of the sector principle in twentieth-century historical-juristic thinking, as yet no polar state claims jurisdiction over an Arctic aërial sector. That is to say, no official pretensions have been made to Arctic airspace within the longitudinal extremities of a subjacent state, in conformity with the claims projected for landed and water domain within polar sectors. Even the Soviet sector decree of April 15, 1926—which proclaims all lands and islands to the north of its mainland (between 32°4′35″ E. longitude and 168°49′30″ W. longitude) as belonging to the U.S.S.R.—fails to make any mention whatever of jurisdiction over the airspace.[62]

The Soviet Government has elected to forego the application of sectorism to airspace in the Arctic, adhering rather to the older, established principles of aërial jurisdiction. Not being a party to the 1919 Convention, the U.S.S.R. nevertheless adopted the principles noted above into its national legislation. The earliest Soviet air law, promulgated as a decree on January 17, 1921, provides by implication for state jurisdiction, and a number of the provisions included in the 1919 Convention are embodied in this decree. For example, it prescribes the limiting conditions under which foreign aircraft may cross Soviet boundaries, and even then special permits are necessary. In 1927, this was followed by a second decree which embodies most of the same principles. A new Air Code was designed in 1932, in which the Soviet airspace is defined as the space above the land and territorial waters of the Soviet Union.[63] The law does not make special mention of jurisdiction in the Arctic Basin.

The policy that neither the Soviet air laws nor the sectoral decree of 1926 applies sectorism to Arctic airspace met with severe criticism on the part of Soviet sectorists.[64] Lakhtine, though admitting that normally states possess jurisdiction only over the airspace above their landed area and their territorial waters, declares that it nevertheless is necessary to solve the question of the rights of

[62] *British and Foreign State Papers* (1926) 124: 1064, 1065; translating text from *Izvestia*, Apr. 16, 1926.

[63] Quoted in Taracouzio, *The Soviet Union and International Law*, pp. 73–75.

[64] *Ibid.*, p. 76.

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polar states to jurisdiction over the airspace above the remaining water area of the Arctic high seas. He decides that inasmuch as the legal status of these water areas, according to his interpretation, is closely assimilated to that of territorial waters over which a state does exercise a limited jurisdiction, and since a littoral state enjoys unlimited control over the atmosphere above its territorial waters, there is no reason to treat the question of the legal status of the air regions superjacent to the Arctic high seas in a different manner. He therefore concludes that each polar state has a right to exercise jurisdiction over the airspace above its whole polar sector.[65] Korovin arrives at much the same general conclusion.[66]

A number of arguments are used in support of this contention. In the first place, it is stated that the high seas in the Arctic are closely assimilated to territorial waters, as noted. Secondly, the principle of jurisdiction over the airspace is declared to be conditioned by the purpose for which the air is used, be it for economic purposes exclusively or otherwise. Finally, in the Arctic it is supposedly impossible to use the air for aërial communication without violating the rights of the state through whose sector the flight is made. In his excellent study on the Soviet sector, Professor T. A. Taracouzio replies to these arguments, declaring that there is absolutely no proof to substantiate them.[67]

It may be added that, in reply to the first argument, the high seas, in the polar regions as well as elsewhere, constitute *res communis*, so that they cannot legally be acquired by occupation, but only by prescription (that is, the acceptance of the existing situation as being in conformity with the international order) or conventional agreement. A polar state therefore possesses only those waters normally constituting high seas if the Society of Nations recognizes them as belonging to the state by perpetual usage. Even jurisdiction over marginal seas is founded upon prescriptive right, supplemented by conventional agreement. States consequently can claim jurisdiction only over the airspace superjacent to these specified maritime areas. The second contention of the sectorists is untenable because a subjacent state is able to determine the purpose for which airspace is used in any manner it may desire. The third

[65] Lakhtine, "Rights Over the Arctic," *loc. cit.*, pp. 714, 715.

[66] "Problema vozdushnoi okkupatsii v sviazi s pravom na poliarnye prostranstva," *loc. cit.*, cited in Taracouzio, *Soviets in the Arctic*, p. 361.

[67] *Ibid.*, p. 362.

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argument is likewise invalid, because it is possible to establish Arctic aërial communications without violating the jurisdictional integrity of the state through whose sector the flight is made. Eliminating the application of the principle to the high seas and those areas covered with permanent ice formations, which are *res communis*, it is possible, as Taracouzio points out, to establish aërial communications between Nome (Alaska) and Spitsbergen.[68] Similar routes are conceivable from northern Scotland to eastern Siberia and from Trondheim or Bergen (Norway) to Alaska. Other routes also might be cited if it were assumed that planes would circumvent *terra firma* in their flights by projecting their routes only over water-covered areas.

At times, the sectorists also raise the following arguments in favor of applying sectorism to polar airspace: The fast-ice often makes it difficult to distinguish the coast lines and the boundaries of territorial waters, particularly in the waters between the islands; the remoteness of the Arctic precludes the extensive use of the air by non-polar states; auxiliary facilities for flying are mostly to be found either on *terra firma* or in territorial waters; and, finally, from a military-strategic standpoint, free air in the Arctic means potential danger to the political integrity of the subjacent states. Of equal force, however, are the considerations to the contrary: The complications caused by the congelation of the water and by the physical distribution of the land can be avoided, respectively, by the use of navigation instruments in the flying machine and by designating definite areas above the various archipelagoes and groups of islands over which jurisdiction belongs to the respective hypothetical sectoral states; long-range flying enables non-subjacent Arctic states to take an active part in polar flying; and, finally, modern flying may progress to a point where long distances and auxiliary facilities will cease to be controlling factors.[69]

Be this as it may, the sector principle in its Soviet interpretation cannot be applied to the airspace in the Arctic, for specific legal reasons. Of paramount importance is the fact that sectorism as such has not yet been recognized in international law.[70] True, international law is dynamic, and therefore it is hypothetically possible that changes may be introduced so as to meet the contentions of the Soviet sectorists. Difficulty, however, in such a case would

[68] *Ibid.* [69] *Ibid.*, p. 364.

[70] As a matter of fact, with the exception of the Soviet decree of 1926, it has not even been recognized in the municipal law of the Arctic states.

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arise from a collision of the new aërial law with the principles governing the legal status of the high seas. Indeed, the rule is that the high seas as well as the air over them is free, and the Arctic cannot very well be exempted from the prevailing doctrine of *mare liberum*. Otherwise, particularly in view of the facilities afforded by modern technical developments, full advantage could not then be taken of the principle of the high seas.[71]

Since the sector principle therefore is unacceptable as a legal maxim in solving the problem of Arctic aërial jurisdiction, the older, recognized principles outlined above continue to apply. But the growing intensity of interest in Arctic airspace requires additional clarification of these principles. It therefore appears to be essential that the postwar conference of states give the matter serious consideration. A series of multilateral air law agreements should be decided upon, and it might be profitable if an international agency were established to administer such problems as reconnaissance, the surveying and laying out of transport lanes, the allocation of franchises and licenses, customs procedures, the adoption and enforcement of administrative air regulations, and the like.

In addition, the problem of territorial jurisdiction should be solved in advance by the establishment of specific provisions of law as affected at the Berlin Conference, 1884–1885, when the majority of Powers recognized the principle of effective occupation (together with the principle of notification) as governing the juridical acquisition of African coastal lands. This might be done by deciding to retain this principle, as liberalized by the Palmas Island, Clipperton Island, and Eastern Greenland awards. Or remaining unpossessed Arctic territory might be recognized as belonging to the Society of States (*res communis*), so that no state can legally acquire a valid title thereto and no title of an individual state is valid as against the others. Naturally, the latter proposal would apply only to island territory, and would not include those islands already consigned to a particular state by international agreement—as was the case with Greenland (1916–1921) and Spitsbergen (1920)—and those islands which can be considered as appertaining to a state by virtue of prescriptive rights. All other Arctic territory would be internationalized, to be administered either by the League of Nations or its future counterpart, by some special international administrative agency, or by qualified states as mandates.

[71] Taracouzio, *Soviets in the Arctic*, pp. 364, 365.

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CONGRESS AND THE CONTROL OF RADIO-BROADCASTING, II

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VI. CONGRESS AND RADIO IN WARTIME

Congress established a policy for wartime radio under Section 606 of the Communications Act of 1934 when it gave the President power to take over the entire radio industry in time of war or national emergency. He took advantage of this in September, 1940, when by an executive order he created the Board of War Communications (previously the Defense Communications Board). In the 1934 act, too, he was given wide authority to suspend the FCC rules and to close stations or to use them as he saw fit. In September, 1939, when a state of "limited national emergency" was declared, there was speculation as to the effect that this section would have on the broadcasting industry. Certain Congressmen showed an inclination to back down from the principle of broad Presidential powers over radio. Representative Ditter's bill of 1940, enthusiastically supported by the broadcasting industry, was intended to curb the wide powers the Communications Act had conferred upon the President. This bill, never acted upon, would have added a provision that no transmitter might be confiscated or silenced because of the "character or contents of any program" or in order to permit the government to engage in or control broadcasting, except upon proclamation by the President that the United States was actually at war.

Previously, Congress had enacted some legislation which is pertinent to the war. In 1932, for example, a law was passed that licenses should be issued to qualified United States citizens only,[88] and in 1941, by a new act, the Commission was enabled to consider the character and capacity of potential licensees in order to guard against "subversive" individuals.[89]

In 1940, a bill authorized communications utilities to contribute free voluntary service to national defense, consisting of experimentation and drill of radio facilities and indoctrination of personnel in preparation for national defense.[90] There was also some concern

[88] S. 4289. [89] H. R. 5074.

[90] S. 3018, 76th Cong., 3rd Sess., Mar. 13, 1940, p. 2761. See also "Controlling Broadcasting in Wartime," by C. J. Friedrich, *Studies in the Control of Radio*, No. 2 (1940).

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in Congress with radio-broadcasting of war news. Prior to our entry into the war, some Congressmen feared that over-emotional radio news broadcasts were being used as propaganda for intervention, and in August, 1941, Senators Clark and Nye announced a resolution for investigation of radio and film material designed to influence the public mind in the direction of participation in the war.[91]

During the last few years, Congress has appeared to be skirting radio-broadcasting issues because of the pressure of other work and also because the industry has not been anxious to have legislation initiated. But the session begun in 1943 is providing a good deal of interest and activity in radio-broadcasting issues. The Select Committee to Investigate the FCC appointed by the Speaker of the House in January, 1943, as a result of Representative Cox's resolution,[91a] seriously threatened to discredit the whole process of legislative investigation by conducting star-chamber hearings and building up a sensational case in the press against the Commission. The entire inquiry was colored by the personal prejudice of the former chairman, Representative Cox, whom the FCC had charged with receiving pay for representing a radio station before the Commission. In May, 1943, Commissioner Durr formally petitioned the Speaker of the House to disqualify Cox as a member of the committee because of his personal interest in the investigation and his bias against the Commission.[91b] In September, the Judiciary Committee, to which the petition had been referred, returned it, alleging lack of jurisdiction. Commissioner Durr resubmitted it, backed by a strong open letter from the *Washington Post* to Speaker Rayburn demanding Cox's removal. Under pressure of public opinion, Cox resigned on September 30, and Representative Lea was later appointed chairman of the committee. Hearings were resumed under the new chairman in November. There are indications also that Congress will attempt to write a new radio act, and hearings on the Wheeler-White radio bill were begun in November.

VII. RECENT ATTEMPTS AT LEGISLATION

Since 1939, attempts at legislation, inspired by dissatisfaction with the FCC, have been concerned with reorganizing the Com-

[91] S. Res. 152. See also H. Res. 292, 77th Cong., 1st Sess.

[91a] H. Res. 21.

[91b] For the documented story of the Cox Committee investigation, see *Memorandum in Support of the Memorial to the House of Representatives for Fair Play to the Federal Communications Commission*, published by American Civil Liberties Union, Sept., 1943.

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mission. In January, 1939, President Roosevelt wrote to the chairmen of the Senate and House Committees on Interstate Commerce: "I have come to the definite conclusion that new legislation is necessary to effectuate a satisfactory reorganization of the Commission. New legislation is also needed to lay down clearer Congressional policies on the substantive side—so clear that the new administrative body will have no difficulty in interpreting and administering them." The next month, Senator Wheeler introduced a bill to create a new commission of three members, to provide for administrative assistants, and to create a department of research and information.[92] Although it was at first thought that the bill would pass without trouble, opposition developed, and Representative Wigglesworth objected to it as "an attempt to conceal from Congress and the people facts and practices."[93]

Senator White later introduced a counter-bill to reorganize the Commission[94] on the basis of the report of the Attorney-General's Committee on Administrative Procedure. Though this bill was never acted upon, it was important as the forerunner of the Sanders bill,[95] introduced in the House in August, 1941. The Sanders bill was concerned chiefly with reorganization of the Commission into the Divisions of Public and Private Communications. The Commission would be asked to study and report on regulation of relations between networks and licensees, licensing of networks, qualifications of licensees, allocations, etc.

The exhaustive hearings on the Sanders bill[96] running from April to July provided an opportunity to review many radio-broadcasting problems such as Commission procedure, relations between networks and station affiliates, licensing of networks, clear channel and superpower, monopoly, and chain broadcasting. Although this particular measure was shelved in the House Interstate Commerce Committee, a similar bill for reorganization of the FCC was introduced at the beginning of the session in 1943[97] by Representative Holmes. Like the Sanders bill, the Holmes bill calls for two separate divisions in the FCC, and the Commission is asked to study and report on policy matters. (Since the foregoing was written, Senators Wheeler and White have introduced a bill—S. 814—

[92] S. 1268, 76th Cong., 1st Sess., Feb. 8, 1939, p. 1275.
[93] *Cong. Rec.*, 76th Cong., 1st Sess., p. 903 (Appendix).
[94] S. 1806, 77th Cong., 1st Sess., July 31, 1941, p. 6641. [95] H. R. 5497.
[96] Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 77th Cong., 2nd Sess. [97] H. R. 1490.

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which parallels the Holmes bill in certain respects and carefully defines the limits of FCC authority).

Congress has recently been interested in other issues. In August, 1942, Senator Clark submitted a resolution[98] requesting the Committee on Interstate Commerce to investigate thoroughly the results of the action of the American Federation of Musicians in denying "its members the right to play or contract for recordings." The resolution was agreed to and a sub-committee appointed to investigate, with Senator Clark as chairman. In January, 1943, hearings got under way as a result of the Clark resolution, with James C. Petrillo, head of the musicians' union, testifying. It is expected that the authority of the sub-committee will be extended and hearings continued. Senator Clark had also introduced a bill to prohibit contracts and combinations which prevent making of recordings for use by radio or juke boxes. The bill would make the AFM liable to criminal prosecution under the anti-trust laws. The measure was not acted upon, however, and Clark reintroduced it in the new session,[99] threatening direct appeal to the President if Congress does not act on the bill. Senator Wheeler and others are said to be opposed to this bill because they do not want to see the anti-trust laws used against labor.

Congress also was concerned with the refusal of NBC and CBS to sell time to the Coöperative League, and in October, 1942, Senator Norris presented a resolution for an investigation of the matter.[100] The broadcasters said that they would sell time for co-operatives to advertise their goods but not their politics, since the latter was a controversial subject, which, incidentally, might offend other advertisers. On the floor of the House, Senator Wheeler said that there could be no excuse for the companies' denying the coöperatives the right to buy time because the subjects were controversial, and pointed out that sponsored radio news commentators discuss controversial subjects continually. He concluded that the networks were acting on "the basis of their own selfish interests and not on the basis of the best interests of the country as a whole."[101] A couple of months later, at conferences between the NAB Code Committee and officials of the Coöperative League, the matter was settled and coöperatives were allowed to broadcast as long as their commercial copy advertises a specific product and does not attack other business systems.

[98] S. Res. 286. [99] S. 2874 and S. 149. [100] S. Res. 305.
[101] *Cong. Rec.*, 77th Cong., 2nd Sess., Oct. 15, 1942 (p. 8467 unbound).

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VIII. THE CONGRESSIONAL SYSTEM[102]

It has been suggested that Congress has not always done an adequate job in the field of radio legislation, that it has been confused, that it has placed personal or sectional interest above the public interest, and that its relations with both the industry and the regulatory commission would bear investigation. Some explanation for these criticisms may be found in the fact that Congress is a political and not a technical body, working through slow and complicated legislative machinery, dealing with a rapidly changing medium for which there are no precedents.

Congress has had to face the job of establishing a pattern for radio regulation with no experience in a comparable field. Unlike the railroads and the telegraph, radio is *not* a common carrier, a fact upon which the industry has always been careful to insist. It is, like the newspaper, a carrier of ideas and opinions, but the press has never been subject to licensing. The responsibility of Congress toward radio, therefore, is not too clearly defined. It has to wend its way cautiously so as not to overstep double bounds—the bounds of control which the government has set for itself in dealing with private industry, and those bounds which the Constitution establishes for preserving freedom of speech. Because Congress has faced unique problems in radio, it has had to grope its way toward a satisfactory legislative policy.

Congressional difficulties have been aggravated by the complicated machinery through which Congress must work to get its job done. In this machinery, the House and Senate committees (in the case of radio, the Senate Committee on Interstate Commerce, the House Committee on Interstate and Foreign Commerce, and to a lesser degree the House Committee on Merchant Marine, Radio, and Fisheries) stand out as the most important cogs in the legislative wheel. Although officially the House and Senate legislate, every one knows that they do little more than approve or disapprove what the committees report to them. If a committee decides to kill a bill, it never reaches the floor; if a committee chooses to report out a bill, it will come to the floor for debate, where amend-

[102] See Roland Young, *This Is Congress* (1942). See also L. W. Haney, *A Congressional History of Railways in the United States;* G. H. Haynes, *The Senate of the United States;* H. Hazlitt, *A New Constitution Now;* L. Rogers, *Crisis Government;* W. Wilson, *Congressional Government;* and C. J. Friedrich, "Public Policy and the Nature of Administrative Responsibility," in *Public Policy*, Vol. I, Yearbook of the Graduate School of Public Administration, Harvard University.

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ments may be added. Thus the character of legislation is almost completely determined before it reaches the floor of either house. The committees are swamped with detailed material, but the majority of Congressmen are necessarily left in the dark about the problems and implications of a particular piece of legislation.

Although it is possible for legislation to be determined even before the committee hearings by a powerful lobby and the resulting predispositions of committee members, the committee hearings are usually the heart of the whole procedure. Here the off-the-record lobbyists are given the opportunity to affect legislation as on-the-record witnesses. At the hearings on the Sanders bill, no fewer than ten interested groups took advantage of this.[103]

Committee hearings, though usually on a more informed level than the debates on the floor, sometimes reveal the ignorance of various Congressmen on the matters under discussion. There would seem to be less excuse for this at the committee hearings than in the general debates, since members of Congressional committees are supposed to specialize in the subjects dealt with in their own committees, rather than to rely exclusively on experts. At the House Committee hearings on the 1934 bill, Representative Merritt said to Sarnoff, then testifying: "Radio is always a mystery to me, as to many other people. Does a new circuit have to do with a particular frequency that is used on that circuit?"[104] At the Senate hearings at the same time, Senator White said: "The chairman will recall that when we were working on this act in 1927 the word frequency was not quite so common as it is now." To which Senator Dill replied, "We were not sure about it ourselves, sometimes."[105] At these hearings, Senator Long was under the impression that the bill being considered sought to combine the ICC with the FRC. More recently, at the hearings on the Sanders bill, at least one member of the House committee had no idea what a reference to the Commission's network regulations meant.

Most of the general debates on the floor are even less satisfactory than the hearings. There is seldom a stating of broad issues, as is the case with Parliamentary discussions concerning the British

[103] NBC; Blue Network; Mutual; Network Affiliates, Inc.; General Federation of Women's Clubs, Washington, D. C.; Federal Communications Bar Association; NAB; CBS; Clear Channel Broadcasting Service; Newspaper-Radio Committee.

[104] Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2nd Sess., on H. R. 8301, Apr. 10, 1934, p. 294.

[105] Hearings before Committee on Interstate Commerce, U.S. Senate, 73rd Cong., 2nd Sess., on S. 2910, Mar. 9–15, 1934, p. 45.

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Broadcasting Corporation. The chief value of the debates seems to lie in the opportunity they afford Congressmen to blast the Commission or the industry. Although no immediate or obvious action may result, the Commission or industry, as the case may be, usually heeds the Congressional warning. There has been much criticism of this system whereby the standing committees determine the bills and resolutions to be considered by Congress, and a good deal of dissatisfaction with the cumbersome road Congress must travel to get a bill passed.

IX. LEGISLATION FOR A CHANGING MEDIUM

Not only procedural difficulties make it onerous for Congress to legislate successfully for radio. There are the difficulties inherent in radio itself—the fact that it is a highly technical and rapidly changing medium. At the recent hearings on the Sanders bill, Commissioner Craven noted the significance of technical progress on the "general philosophy and regulation of communications," and stated that it seemed essential that Congress should not base long-term legislation upon what may appear to be a good detailed solution of today's minor radio troubles.[106] Congress is by no means unaware of its inadequacies in a field where legislation may become obsolete quickly. It has preferred to legislate generally and let suggestions for more specific legislation come from the Commission. At the 1934 hearings, Bellows of CBS asked that the Commission be left free to deal with technical engineering problems in its own way. "So far," he said, "Congress, and we think wisely, has kept away from all purely engineering questions with regard to radio, recognizing that the solution of such problems is exactly what the Commission exists for."[107] Aylesworth of NBC seconded this idea and suggested that only a commission with broad powers could give the industry the flexible regulation it required. In the 1934 act, Congress requested help in planning policy when it asked the Commission for a report on desirable amendments. The next year, Representative Scott introduced a resolution for the creation of a broadcasting research commission to study the technical aspects of radio and lay the broad lines for a regulatory policy, since neither Congress nor the Commission had time for this; but it was not acted

[106] Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 77th Cong., 2nd Sess., on H. R. 5497, p. 985 ff. of Committee Print.

[107] Hearings before Committee on Interstate Commerce, U.S. Senate, 73rd Cong., 2nd Sess., on S. 2910, Mar. 9–15, 1934, p. 57.

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upon.[108] Frank Mullen, vice president of NBC, recounting the new developments in the ultra-high frequencies, said at the Sanders hearings: "It should be remembered that the broadcasting industry is, in effect, operating under an old law so far as this progressive industry is concerned."[109] The radio act of 1927, reënacted in 1934, was promulgated when present broadcasting problems were nonexistent. Burns of CBS also spoke of the rapidly changing industry: "It is not the same industry that it was when the Commission began its hearings in 1938."[110]

X. CONGRESS AND THE EXPERTS

Congress makes no pretense to being a body of engineering or technical experts; indeed, as was said before, the majority of Congressmen know little about radio. Naturally, therefore, Congress's final decisions sometimes have represented what is best for the most powerful, or simply for the majority of, interests which have been heard. For its information, Congress has had to rely on the experts, most of whom come from the industry or from other interested groups, and are in fact propagandists. Since disinterested experts are almost impossible to find, Congress has had to balance the claims of one expert against those of another. Both informally and formally—at Commission and at Senate and House committee hearings—the experts—engineers, lawyers, broadcasters, etc.—have been allowed to hold forth, and indeed have been pumped dry by their hearers. At the Sanders hearings, there was a discussion of radio experts, in the course of which their versatile backgrounds came in for a bit of ribbing. At another point, when Mr. Fly stated that the Commission depended largely on advice and information given it by experts, Mr. Brown, a member of the House Committee said: "I wonder if you can tell me what an expert is. I would like for you to define an expert." An ordinary damn fool away from home was suggested as a good definition. But Fly replied seriously: "We pick them out of the industry," and added that they were well qualified in their respective fields.[111] It is true that the Commission staff contains disinterested persons, but for the most part the Commission personnel is not called upon to inform Congressmen on radio

[108] H. Res. 370.

[109] Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 77th Cong., 2nd Sess., on H. R. 5497, p. 187 of Committee Print.

[110] *Ibid.*, p. 336. [111] *Ibid.*, p. 763.

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matters, and Congressmen rarely find time to study the Commission's materials and publications.

XI. CONGRESS AND THE PRESSURE GROUPS

As the highest legislative authority, Congress has a central position in the pattern of control, central in the sense that it stands between broadcasters, listeners, and advertisers on the one hand and the FCC on the other. It is at once the sounding board of the pressure groups and a curb upon the Commission. Some notion of the widespread activities of pressure groups has been given above. In general, two types of organized interest groups have attempted to use Congress. Those wishing to obtain licenses, increase power, and buy stations constitute one group. KWSC, of Pullman, Washington, e.g., reportedly boasted that it got Clarence Dill to see to it that the FCC increased its power. The other group consists of those interested in program content, either as listeners, as broadcasters, or as potential broadcasters. The number of persons steadily appealing to Congressmen as well as Commission members is appalling. At the Sanders bill hearings, Chairman Fly complained about the many persons representing the 900 radio stations throughout the country. Whenever anyone purports to represent large groups of people, he said, you must ask, "How does he get that way, and does he really represent them?" When a Congressman suggested that Fly had set himself up as a "czar," he flared: "What do you mean by my setting myself up as a czar? Why, these people set themselves up to run the government."[112] And, indeed, so successfully have the interest groups brought pressure on Congress and the Commission that they have played an important rôle in influencing regulatory policy. An amusing incident which occurred during the Sanders hearings illustrates the intimate nature of this influence. During the testimony of Alfred McCosker (chairman of the Board of Directors of Mutual), a question was raised involving a passage in the Commission's report on chain broadcasting. When the witness hesitated, one of the committee members, who shall remain unnamed, obligingly offered his copy for check. As he handed down his copy, those present noticed that it bore the office stamp of the Columbia Broadcasting System. General laughter indicated that everyone recognized the humor of the situation.

[112] *Ibid.*, p. 845.

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XII. CONGRESS AND THE INDEPENDENT REGULATORY AGENCY

Perhaps the most fundamental problem, however, is the relationship between the Commission and Congress, involving as it does the respective functions of each body and the whole theory of the independent regulatory agency. Congressmen have always been concerned with whether or not the Commission was fulfilling the Congressional mandate. The legislators themselves do not always agree on the meaning of certain sections, so that Congressional intent is very often a matter of interpretation. At the Sanders hearings, the importance of the interpretation of the phrase "public convenience, interest, or necessity" was pointed out by Louis Caldwell during discussion of the broadcasting regulation. "Those who attack the Commission's regulations," he said, "have told you repeatedly that Congress did not give the Commission any such power and did not intend to. I believe, with the Commission's law department, that Congress did give the power and intended to give it. *The question as to who is right turns on the meaning of the formula,*"[113] which is the only limitation Congress placed on the Commission's authority to make regulations for chain broadcasting.

Beyond this, there is the problem of where exactly the responsibility of Congress ends and that of the Commission begins. In large part, the answer to this depends on one's theory of the American governmental system. A conservative like Commissioner Craven would argue that the Commission is an agency created by Congress to administer policies established by Congress. In his opinion, the Commission has no power to go farther and attempt to enforce what Congress decided not to do.[114] In his opinion in the Pottsville case, Justice Frankfurter wrote: "Congress, which creates and sustains these agencies, must be trusted to correct whatever defects experience may reveal."[115] Formally and traditionally, regulatory agencies like the FCC are supposed "to return to Congress for further instructions" whenever they find themselves confronted with novel situations which the act authorizing their work did not anticipate. On the other hand, the view that the administrative agency must necessarily have legislative power was presented by Mr. Bingham of the Federal Communications Bar Association at the Sanders hearings. Said he: "The type of regulation

[113] *Ibid.*, p. 613. [114] *Ibid.*, p. 965 ff.
[115] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (Jan. 29, 1940).

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must necessarily change from time to time as there are developments in the particular subject being administered." It is impossible for Congress to "make rules for the unforeseen future regulation of the subject-matter, and therefore it must delegate some legislative power to an administrative agency." Especially in radio communications, there have been great technical developments since the act of 1927, and "it would be impossible for the Congress to lay down all rules and all regulations governing communications in an act."[116] Not all industry representatives, however, feel that the Commission should assume more power. Neville Miller of the NAB condemned the indefiniteness of the act which causes "pressure upon the Commission to assume powers far beyond those granted by the Congress to a regulatory Commission." Moreover, complained Miller, a broadcaster cannot challenge the Commission's authority by referring to the act.[117] As we have shown earlier, Congress itself has never been happy about the duties and set-up of the Commission.[118]

XIII. CONCLUSIONS

The conclusions of this study on the rôle of Congress in the control of radio-broadcasting are fairly clear. In general, the record is one of confused efforts to "regulate" a very young industry in response to a multitude of complaints and pressures, but with no real understanding of the situation. Neither the Congress as a whole nor the committees of the House and Senate concerned with radio legislation have ever produced a genuine "policy" for radio-broadcasting. They never have provided a pattern for the most effective utilization of radio in the development of American democracy. Such basic issues as whether radio-broadcasting is entitled to the same constitutional rights as the press have never been settled. Good arguments can be advanced on both sides, but without a decision the conduct of radio is fraught with unnecessary tensions and conflicts.

Characteristically, the basic statute, the Federal Communications Act of 1934, provides a compromise through a contradiction. It charges the Commission to see to it that radio-broadcasting facilities are managed "in the public convenience, interest, or necessity," yet it forbids the FCC to concern itself with the content of

[116] Hearings on H. R. 5497, *op. cit.*, p. 97. [117] *Ibid.*, p. 135.

[118] For a competent analysis, published since this was written, see Thomas P. Robinson, *Radio Networks and the Federal Government* (1943).

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radio programs by stigmatizing such sharing of responsibility as interference and censorship. Sharp conflicts are bound to be the result of such a self-contradictory policy. In order to resolve it, Congress would have to address itself to such basic questions as these: What rôle do we want radio-broadcasting to play in the nation's political, religious, and cultural life? Do minorities with particular educational and other interests have special rights or not? Should managements with a predominantly commercial outlook determine the programs to be presented and the time of presentation, or should listeners have a voice in this matter? These and many similar questions have had no thorough exploration in Congress, though their answers are admittedly basic to a national radio policy. To be sure, individual Congressmen have voiced subjective, if emphatic, opinions on these subjects. Such expressions have been haphazard, lacking any substantial support of scientific evidence such as guides Congress in more traditional fields of public policy; they have had virtually no effect upon the actual pattern of control.[119]

Since America's entry into the war, all these shortcomings have become more strikingly evident. The vital rôle of radio in relation to public opinion and national morale, and hence in relation to the war, is universally admitted; yet no effective policy has been evolved, because commercial management has resisted suggestions for over-all planning. It is true that many fine programs have been offered by networks and individual stations, and many good directives have issued from the Office of War Information and related agencies. At the same time, however, sharp criticism has been voiced by various groups of the public, both expert and lay.[120] Perhaps the most striking of these challenges has come from a rather unexpected quarter. In its August, 1942, issue, the *Reader's Digest* launched a virulent attack upon what it called "Radio's Plug Uglies." It invited letters from readers on the subject of offensive advertising plugs, and in the October issue was able to report that 15,000 letters had already been received from listeners all over the country, denouncing the radio announcers' outpourings.

[119] See for a carefully elaborated policy pattern the study based on a report of a committee of the National Economic and Social Planning Association, C. B. Rose, Jr., *National Policy for Radio Broadcasting* (1940).

[120] On the problem of responsibility, see "Radio in Wartime," in *Education on the Air* (1942), edited by Josephine MacLatchy.

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In spite of public attention and debate, Congress has done little or nothing to forge a policy for radio-broadcasting in wartime. Leading members of both the House and Senate have confessed virtually complete ignorance of the issues involved. One of the most striking special fields requiring careful attention is that of foreign-language broadcasting.[121] Nothing responsible has been said or done on this score in Congress or in its committees, and yet there can be little doubt that the issues involved are crucial. In the absence of any guiding policy from Congress, the Federal Communications Commission had to venture into this field without adequate authority or directives. During the summer of 1943, the Cox Committee investigating the FCC was almost entirely concerned with the activities of the Commission against pro-Fascist Italian and German language broadcasters, and attempted to prove that there was no legal authority for the "domination of foreign language broadcasting stations by the FCC. . . . " Actually, at the request of the Office of Censorship, and in line with its responsibility to use the licensing power in the public interest, the Commission had done a good job of investigating and causing removal of pro-Fascists who were broadcasting in Italian and German.

The weaknesses of our Congressional system show up strongly in the regulation of radio-broadcasting. The failure of the democratic process to function satisfactorily raises grave general issues transcending this study. But in the particular field with which we are concerned the facts speak eloquently and call for a specific remedy. It is the writers' settled conviction that in view of Congressional organization, a regular committee of Congress should devote its entire time to communications problems, among the toughest of which are those confronting radio-broadcasting. Only through such a committee could at least some members of Congress acquire the knowledge demanded by the technical complexity of radio and the crucial nature of the issues involved. Only when guided by such a committee will Congress be able to rise to the task of formulating a genuine public policy for radio-broadcasting in the country which has seen the most extraordinary development of this medium of opinion, propaganda, and morale, under a unique system of private ownership and government control.

[121] See Jerome S. Bruner and Jeanette Sayre, "Short-Wave Listening in an Italian Community," *Public Opinion Quarterly*, Vol. 5, No. 4; Jeanette Sayre Smith, "Broadcasting for Marginal Americans," *ibid.*, Vol. 6, No. 1; C. J. Friedrich, "Foreign Language Radio and the War," *Common Ground*, Autumn, 1942.

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AMERICAN GOVERNMENT AND POLITICS

THE FACE-TO-FACE WAR INFORMATION SERVICE OF THE FEDERAL GOVERNMENT

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The face-to-face war information program of the federal government came to a close on July 15, 1943. On this date the Organizations Service Division of the Office of Civilian Defense was abolished by James A. Landis, director of OCD. Thus ended the last remaining organized effort of the national government to insure full civilian understanding of the war through methods found only in democratic countries, viz., discussions, forums, town meetings, etc. This change in the conduct of the war deserves the attention of political scientists and others interested in the operations of democratic government. The way in which the program was conceived, the manner in which it was administered, as well as the deliberate way in which it was abolished, throw important light on the home-front policies of the government. They also indicate the prospects for a democratic civic education program in the United States.

Origin of the Face-to-Face War Information Program. The Organizations Service Division was established in the Office of Civilian Defense by Administrative Order No. 30, dated January 4, 1943. The face-to-face war information program, which was the primary responsibility of the Organizations Service Division, had been delegated to OCD after a series of negotiations extending from June 12 to December 15, 1942, and involving the Office of War Information, Coördinator of Inter-American Affairs, OCD, Office of Education, and the Bureau of the Budget.

OWI had been directed by executive order to "formulate and carry out through press, radio, motion pictures, and other facilities, information programs designed to facilitate the development of an informed and intelligent understanding, at home and abroad, of the status and progress of the war effort and of the war policies, activities, and aims of the government." It was recognized by OWI and others involved in the negotiations that an "informed and intelligent understanding" cannot be attained if the people are looked upon as passive recipients of information handouts. Real understanding comes from participation of the citizen's mind through group discussion of issues and policies. Only in this way does the citizen of a democracy develop a sense of responsibility for the

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successful prosecution of the war. The cracker-barrel, round-table, town meeting, convention, study and discussion group, and other face-to-face activities, so well-known in the United States, are all manifestations of the need and desire of democratic people to participate in the formulation of public policy.[1]

Because of its widespread contacts with voluntary civilian groups, including defense councils and national organizations, the OCD seemed to be the proper federal agency for servicing face-to-face war information programs throughout the nation. In providing this service, OCD was to have no news and information production function. It was merely to be responsible for channeling materials and information from federal agencies to the civilian face-to-face programs, and to give assistance, when requested, in developing these programs. OCD was to have no direct concern with the mass media, viz., press, radio, motion pictures, so far as war information programs were concerned.

Although the Organizations Service Division of OCD was in actual operation for less than five months,[2] those months indicated both the overwhelming need for and the potentialities of a properly administered federal program to increase civilian understanding through the face-to-face medium.

OCD Administrative Order No. 30 described the functions of the Organizations Service Division in the following terms:

> To assist national organizations to have a maximum share in the civilian war effort by enabling them to participate in national programs of the Office of Civilian Defense and other Federal agencies; to assist such organizations and the communities in which State and local defense councils are located to obtain adequate material for informed discussion and study of war problems.
>
> (a) The Division will act as a channel of communication for war information between the Office of War Information and State and local defense councils and national organizations; it will make recommendations to appropriate agencies for changes in programs on the basis of communications from defense councils and national organizations.
>
> (b) The Division is responsible for providing State and local defense councils with information concerning war problems and methods for dealing with such problems. In this connection it will:
>
> (1) Assist in the development of group discussion and forum activities of the appropriate committees of State and local defense councils.

[1] Prior to the establishment of the program described herein, the Office of Education had carried on extensive public forum projects and adult education activities. Reference should also be made to the program of the Coördinator of Inter-American Affairs to further public understanding of the other American republics. This program includes grants to inter-American centers, scholarships, exchange of scholars, Spanish-teaching projects, motion pictures, pamphlets, radio programs, etc.

[2] OCD Administrative Order No. 35 abolished the O.S. Division as of July 15, but Mr. Landis had indicated in a letter of June 21 to Senator McKellar that he was not asking funds for continuing the Division.

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(2) Assist in the development of Speakers' Bureaus in State and local defense councils.
(3) Provide councils with appropriate written, visual, and graphic materials relating to war.
(4) Prepare Operations Letters relating to the work of national organizations.

(c) The Division will plan programs in coöperation with national organizations to enable them to take a maximum part in the civilian war effort. In this connection it will:
(1) Provide material to all organized national groups on programs of the Office of Civilian Defense and on Federal programs of other agencies in which the Office of Civilian Defense is assisting, except Labor groups which are supplied by the Labor Division of the Office of Civilian Defense.
(2) Act as channel for contacts between national organizations and other war agencies which have no established organization contacts; on the basis of communications from national organizations, it will make recommendations to appropriate agencies for changes in particular programs.
(3) Adapt and transmit to national organizations programs of other sections of the Office of Civilian Defense, the Office of War Information, and of other agencies.
(4) Advise national organizations on problems of coördination of effort; keep the appropriate organizations informed of the war activities of other organizations; encourage coöperation between organizations at the State and local levels; encourage organizations to stimulate their memberships to participate in the activities of the local defense councils; maintain liaison with national organizations by correspondence and conference and advise them concerning specific methods of executing particular programs.

Services Provided by the Organizations Service Division to National Organizations. Private voluntary groups and organizations are the backbone of any democratic society and are an integral part of the American way of life. Throughout the nation and in each community, these organizations are the established groups of organized civilian activity. With the coming of the war and the consequent national emergency, they have wanted to take an active part in the national war effort.[3] Their greatest use has been in channeling information to the millions of citizens who are their members.

The Organizations Service Division provided a single point of contact for national organizations and federal war agencies in regard to information about government war programs. National organizations welcomed this arrangement because it reduced to a minimum correspondence and personal calls whenever they wished to know about specific programs of federal agencies. At the same time, they were relieved to have requests

[3] The importance of national organizations to furthering an understanding of the war effort had been recognized by the Office of Facts and Figures by the creation of a national organizations unit, and later by OCD, when this unit was transferred there from OFF. In the Office of the Coördinator of Inter-American Affairs, likewise, close relations had been maintained with these organizations. The staff and functions of all these units were, however, very small.

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for assistance from the national government come through a single central channel rather than from each of the agencies involved. The federal agencies equally welcomed having a convenient channel to these national organizations without setting up in each agency adequate personnel for this liaison function.

As a central point of contact with most of the federal war agencies, the Organizations Service Division maintained a continuing analysis of the number and character of private organizations, the nature of their membership, and the type of civilian war activity in which they could be of maximum service to the nation, and maintained continual contact personally, and through correspondence, with leaders of such organizations. It gave advice and assistance to these organizations as to how their members could best become a part of constructive national and community war programs.

Particularly important was the service given these organizations on the pending programs of the national government.[4] The content of these programs was, of course, determined by the federal agency involved. However, the Organizations Service Division had the important task of relating these governmental programs to each other and of presenting them in a manner suitable for activities of private groups and organizations.

The many government programs and campaigns calling for civilian cooperation were grouped by the Organizations Service Division under a few major themes such as conservation, anti-inflation, manpower, United Nations, etc.[5] In this way the many scattered and apparently unrelated programs of different agencies could be made meaningful in terms of the everyday life of the individual citizen.

The special function of the Organizations Service Division in presenting these programs to national organizations was to show the reasons why they were necessary, and to distribute relevant explanatory background materials and information so that the programs could be better understood by members of the organizations. The ordinary press releases of government agencies were not directly of use in the activities of national organizations. Especially prepared materials were needed, adapted to the media through which group memberships are reached. Magazines, speakers, conventions, meetings, special bulletins, study guides, discus-

[4] The following is a partial list of the programs on which the Organizations Service Division provided information: Farm labor, victory gardens, point rationing, price compliance, conservation, transportation, fuel oil, child care, recreation, school staffs and facilities, nurses' aides, school health and sanitation, family welfare, social protection, nutrition.

[5] The Program Coördination Division of OWI ultimately adopted a similar set of themes concerned with civilian mobilization.

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sion groups—these and many others are the special ways whereby these organizations communicate and work with their members. They provide ways of increasing acceptance of war programs through understanding as distinguished from mere obedience. Maximum utilization of this medium to reach the civilian population therefore required continual adaptation of federal agency materials to the needs of specific organizations. The magnitude and importance of this function are suggested by noting that continual contact was maintained with well over a thousand organizations in the interpretation of over fifty federal programs.

In addition to the purposes indicated above, the Organizations Service Division sought to secure the coöperation of individual organization members with defense councils in meeting community-wide war problems. The coördination of war programs in the community was considered the special task of the war-created defense councils, but the aid of long established groups and organizations was essential for successful community action.

Services Provided by the Organizations Service Division to Defense Councils. Defense Councils are created by state and local governments. They are not under the direct control of the national OCD. In keeping with this basic pattern, the Organizations Service Division did not impose its information program, but sought to provide assistance in the development of face-to-face war information programs only upon request of defense councils. As the program of the Organizations Service Division developed, it was found that increasing numbers of defense councils were undertaking to meet a wide public need for information about the wartime activities of the nation. The most common method of meeting this need was through the establishment of a War Information Committee (or a committee of some other name) in the Defense Council, with three primary functions.

(1) The first function was to establish at some convenient point in the community a War Information Center, or a series of War Information Centers, where official and non-official information about the war was readily accessible. These information centers, centrally located, frequently also served as places where various groups in the community could arrange meetings dealing with the wartime activities of the community and of the nation. In these centers, books, pamphlets, maps, pictures, insignia, posters, and civilian defense equipment were displayed, and wherever possible were available in sufficient quantities for distribution.

The War Information Committee centralized the many channels of information available in the community. Usually the activities of the center included the keeping of a calendar of war meetings and events, answering inquiries concerning sources of information not available at the

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center, maintaining and classifying all sorts of information not available at the center, maintaining and classifying all sorts of information appearing in books, pamphlets, magazines, and newspapers, and guiding speakers and discussion leaders and others in their search for facts regarding the war. Sometimes the center was located at a public library. However, the important thing was that it be centrally located in order to be readily accessible to the entire population. In larger communities, it became necessary to set up branches, because of transportation difficulties.

(2) A second function of the War Information Committee was to serve the entire Defense Council in making available background materials concerning specific federal and other wartime programs. Whereas other committees on nutrition, child care, salvage, etc., had the responsibility of organizing and providing technical knowledge, the War Information Committee had that of providing the "why" and the background against which the individual campaigns, such as nutrition, child care, and salvage, became more meaningful to the community as a whole. Through the War Information Center, the War Information Committee provided a convenient point for the distribution of specific pamphlets and other materials relating to the particular federal program, and through its special contacts with clubs, groups, and other organizations, as well as through the Speakers' Bureau, the War Information Committee was able to provide channels of communication for the remainder of the Defense Council committees.

(3) A third function of the War Information Committee was to serve the large number of existing groups and organizations found in every community, and which constitute the framework of the organized community life. These organizations, including women's clubs, civic groups, trade and industrial organizations, churches, fraternal societies, youth groups, labor unions, patriotic groups, service clubs, and professional groups, were all interested in participating in the wartime programs of the nation, and the War Information Committee usually took a special responsibility for showing these organizations how they could most effectively contribute to the wartime program as this was coördinated through the Defense Council. These organizations had their regular meetings for purposes of hearing speakers, arranging discussion programs, etc., and were, therefore, anxious to secure the most recent war information available. It was one of the functions of the War Information Committee to serve and coöperate with these many existing organizations in order that the community as a whole might understand better the nature of the wartime program and activities of the nation.

In carrying out the foregoing functions, the War Information Committee generally was interested in the use and development of a number of specialized techniques. These included the following:

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1. *Speakers.* In many communities, the War Information programs consisted in the beginning almost entirely of the speaking activities of Victory Speakers. In addition to their speaking ability, Victory Speakers had special knowledge in war related fields, and they usually had been provided with special materials which helped them to study problems upon which they spoke. Many of the Victory Speakers served as leaders in meetings in which large groups listened to and participated in discussion forums of various kinds. In response to an ever-widening demand, most Defense Councils established Speakers Bureaus which were a logical part of the activity of War Information Committees.

2. *Discussion Programs.* Large numbers of established organizations, such as women's clubs, civic groups, trade and industrial organizations, churches, fraternal societies, youth groups, labor unions, patriotic groups, service clubs, and professional organizations, have extensive programs of public information to help their members understand better the broad problems which war is bringing to the community. In increasing numbers, these organizations have been relying upon small discussion groups to help individuals clarify their thinking about the many problems and issues involved in a total war such as that in which we are now engaged. All of these discussion programs, forums, institutes, etc., assume that there will be available adequate and reliable information. The War Information Committee, through its general activities and particularly the War Information Center, had an opportunity here to be of great service to these many existing organizations, to help them in the development of their programs, and to assist them in securing the materials needed.

3. *Community Radio Programs.* Local radio stations carry various types of network discussion programs to which millions of people listen regularly. War Information Committees, in coöperation with existing private organizations, such as those enumerated above, had here again been furthering public understanding by helping the development of these groups throughout the community. As travel to public meetings was curtailed by wartime restrictions, the importance of local radio programs as a source of information naturally increased.

4. *Visual Materials.* There has been a growing demand for clear visual presentation through both 16mm and 35mm motion pictures dealing with wartime activities. Here again the War Information Committee had an excellent opportunity to act as a clearing-house of information concerning the availability of visual materials of this kind and to see to their adequate use in the community.

The face-to-face war information activities of Defense Councils were community-wide activities. They were the direct product of a widely felt community need for a better understanding of the war issues and the war-related activities of the nation. They reflected the inadequacy of the or-

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dinary mass media of press, radio, and motion pictures in giving the citizens of a democracy that feeling of personal participation and responsibility which is necessary to the successful prosecution of the war. The existence of this feeling provides the difference between the informed allegiance of a democracy and the blind obedience of fascism.

In attempting to meet this demand for face-to-face war information programs and facilities, Defense Councils soon found virtually insurmountable difficulties. Located at the lowest level of the governmental hierarchy, at great distances from Washington, and confused by the vast machinery of war agencies, these Defense Councils could not get quick access to the informational services needed. For example, there was no central place through which to get outstanding speakers on important aspects of the war effort. There was no uniform method to get posters or 16mm motion pictures about the war. There was no simple and direct method of getting for information centers the most recent and important pamphlets, leaflets, and other printed materials.

The Organizations Service Division attempted to meet these needs of the Defense Councils. Through its contacts with all government agencies, the Division was able to set up simple and direct procedures for getting samples of the most important wartime publications of nearly 20 agencies into information centers. It was able also to develop simple plans and devices for the more effective distribution of posters and 16mm films. At the time of its dissolution, the Division was in process of developing a national service for both national organizations and defense councils wanting to secure speakers from the federal government's personnel.

In addition to the foregoing, the Organizations Service Division, in response to requests from Defense Councils throughout the country, was giving assistance and offering suggestions for the organization and operation of information centers, speakers' bureaus, discussion programs, town meetings, etc. Pamphlets had been prepared on all the main aspects of face-to-face war information programs, but publication was stopped in anticipation of the abolition of this service. With respect to the face-to-face war information services, the Organizations Service Division had established itself both as the central clearance point for most of the federal agencies and as the chief service agency of the national government for private organizations and defense councils.

Personnel and Structure of the Organizations Service Division. The personnel of the Organizations Service Division was small and its structure simple. In the Washington office, the Division consisted of three sections, in addition to the Office of the Chief:

1. *National Organizations Section.* A professional staff of fourteen developing programs for and maintaining contact with national organizations. This staff was divided into four units dealing with religious, edu-

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cational, civic, and business and industrial groups. Continual contacts with labor organizations were maintained through the Labor Division of OCD.

2. *Program Service and Supply Section.* A professional staff of five concerned with program planning and materials. This section kept in touch with other federal agencies in regard to forthcoming materials, handled all distribution for the Division, kept central files and programs of national organizations and defense councils, and developed program suggestions.

3. *Community War Information Section.* A professional staff of nine to service defense councils in terms of speakers activities, war information centers, discussion programs, visual aids, etc. This staff exercised general supervision over the Division's regional staff of twenty-five professional persons distributed among the nine OCD regions and assigned specifically to maintain contacts with state and local defense councils and to give service in terms of the face-to-face war information programs.

The total cost of the staff and travel for the six-month period, January 1 to June 30, was about $150,000.

Jurisdictional Relations. The Organizations Service Division operated solely in a service capacity to other federal agencies and to private organizations and defense councils. It was not concerned with policy determination except as called upon to assist other agencies in planning programs and materials. The closest relations existed with OWI. Its Educational Services Division had a Planning Committee of which the chief of the Organizations Service Division was a member. This Division prepared materials, particularly discussion outlines, for distribution to national organizations and defense councils through the Organizations Service Division. In addition, other divisions of the domestic branch of OWI, including Motion Pictures, Publications, Radio, Graphics, and the Campaign Bureau, provided a continual flow of special materials which went to national organizations and defense councils through the Organizations Service Division.

The important informational program of the CIAA, including pamphlets, motion pictures, and speakers, was geared into the activities of the Organizations Service Division. In this way, the CIAA program reached defense councils, local communities, and national organizations.

With OPA and certain other operating—as distinct from informational—agencies, working relations were soon developed. Here OCD's function was to provide background materials explaining the meaning of various agency programs and their interdependence for the war effort.

For a short time, an Educational War Council, called by OWI, served to hold together the interests of all agencies with educational and informational programs. To a certain extent, the Inter-Agency Volunteer Committee of OCD served the same purpose. Again, the Campaign Bureau

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(later called Program Coördination) of OWI served as a traffic department for campaigns of various agencies. Increasingly, however, the effectiveness of the Organizations Service Division as a coördinating body for war information programs depended upon the maintenance of continual and direct personal staff relations. Of great importance in keeping lines clear with other agencies was the Bureau of the Budget, which continually sought to eliminate confusion and duplication. From the very start of plans for the Organizations Service Division, the Bureau of the Budget participated in nearly all conferences and kept informed upon developments in the agencies involved.

No jurisdictional problems arose in dealing with national organizations. They welcomed the work of the Organizations Service Division and uniformly expressed hope that it would be continued and strengthened. Complicated jurisdictional problems did arise in dealing with defense councils. These councils are creatures of state and local governments. The states are very jealous of control over the councils, and it was an established policy of OCD when the Organizations Service Division was created to deal only with state defense councils, unless the latter specifically permitted relations with local councils. This system meant that the effectiveness of the Division's program of service depended upon the interest of state councils. Serious difficulties were encountered in some states due to delay or inaction in establishing information programs, and to insistence by some states that no materials of any kind be sent to local defense councils without prior screening and approval of state officers. Most states refused to report to the OCD the extent or location of war informational activities for fear that direct mailing would take place. As a result, the face-to-face war information program never got started in some states, in spite of specific evidence of citizen interest. Here the states set up absolute barriers between the federal government and its citizens.

Further complicating relations with community defense councils was the system of OCD whereby the directors of the nine regional offices became in effect policy officials instead of administrative officers. It became necessary, therefore, with few exceptions, to engage in long discussions with the regional director much as if he were a governor or a director of a state defense council. The decision of the National Director of OCD was not enough to put a program in operation beyond the Washington office. Even the provision of a special staff for the war information program in each region was not enough, since the regional directors could appoint regional personnel without approval from the OSD.

Reception of the OCD Face-to-Face Program. The war information program of OCD met with approval in practically all quarters. Other government agencies welcomed the centralized approach to national organizations and to community defense councils. Contacts were developed and

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maintained by the Division with more than twenty agencies and bureaus directly concerned with educational information programs about the war. As already indicated, OWI and CIAA used the Organizations Service Division as their chief channel to national organizations and defense councils for information under their respective jurisdictions. Agencies like OPA, WMC, OFFR, Agriculture, Treasury, etc., were interested in using this channel for background or "why" materials which would help civilians understand the relation between the agency's own program and the general war effort. The Army and many of the old line agencies like Labor, Commerce, State, etc., used the channel of the Division to distribute leaflets to defense council information centers.

Private organizations equally welcomed the establishment of a single point of contact in Washington through which they could get access to the program of most government departments and agencies. The churches, youth serving organizations, women's and men's clubs, patriotic and service and business organizations, looked to the Division for information about the wartime activities of the federal government. To them, the establishment of this centralized point of contact meant avoidance of confusion and of duplicating efforts and a saving of time and expense. When the representative of the Division called on these private organizations, they brought information about the most important programs of the federal government and were prepared to show their inter-relationship and relative importance.

To local defense councils, as well as most state defense councils, the war information program of OCD provided a much-needed new *raison d'être*. In most parts of the country, enthusiasm for defense council protective services had begun to wane by the summer of 1942. Where this proved the case, defense councils tried placing more emphasis upon civilian war services, such as day-care for children, nutrition, scrap collection, bond sales, etc. Even these broader services had hard sledding because of existing community agencies and the services of other federal agencies, like the Federal Security Agency. The community war information program, with its emphasis upon war information centers, speakers, discussion programs, pamphlets, posters, and 16mm motion pictures, provided new life because it helped people understand the war activities of the nation. Whether the defense councils needed more volunteers as air raid wardens or as civilian war service workers, recruitment became easier when people saw the "reason why" their service was needed. Moreover, the war information program increased the chances for the defense council to become the leading and coördinating influence in the community for democratic participation in the war effort.

Opposition to the work of the Organizations Service Division came from certain individuals in state defense councils. Some of them sought to set

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up a defense council monopoly for community war programs and opposed the idea that the Organizations Service Division should have contacts with national organizations. They argued that members of national organizations should get information about war programs only from their local defense councils! Others were opposed to the discussion program per se—arguing that wartime is no time to foster discussion—even in a democracy. Partly, this group was made up of professional speech men who sought to impose one-way speaking upon the nation in place of democratic discussion; partly, it consisted of undemocratically-minded persons who feared taking the risk of real discussion and difference of opinion. Finally, there was some opposition from state defense council officials who claimed that the entire discussion and speakers' program was a part of a fourth-term campaign.!

Summary and Conclusions. A. The war information program outlined above was planned and inaugurated as an essential part of a democratic war program. It was to provide quick and dependable channels through which background materials necessary to an understanding of the war could get to the people. It was to assure opportunities for people to meet and discuss—and thus better to understand—the many problems which the war program inevitably raises for individuals, communities, and the nation as a whole. Finally, it was to give the people maximum opportunities to raise questions, voice criticisms, and "talk back" to government officials. In short, the face-to-face war information program was intended to make sure that those two essentials of any democracy—understanding and opportunities for expressing public opinion—were kept alive throughout the war period.

B. Experience in the operation of the program, though limited to about six months, warrants the following conclusions:

(a) The people of the United States welcomed opportunities to get direct information about the war through speakers, pamphlets, leaflets, motion pictures, and posters. The demand for these materials always far exceeded the supply. The mass media of press, radio, and motion pictures were entirely inadequate to the job of keeping the people understandingly informed about the war.

(b) There was great need for materials of all kinds explaining the relations between various war programs such as taxation, bond drives, rationing, manpower laws, etc. Not enough effort had been made to show that these were all parts of a domestic program for total war. Similarly, not enough had been done to show how the global character of the war affected the domestic program and individual convenience.

(c) People were anxious for opportunities to meet and discuss war issues and war problems and, wherever tests were made, showed a marked increase in wartime activities as their understanding of the war broadened.

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(d) Organizations and individuals welcomed assistance from the government in getting access to materials and in setting up meetings and forums for discussion.

(e) The established voluntary associations, much more than war-born defense councils, were active forces in encouraging participation in the war through increasing understanding. In this and other respects, the voluntary groups are one of the most potent forces for mobilizing the nation for war.

(f) A federal agency can provide this kind of information service with a minimum of conflict with state agencies, and with full respect for the democratic principles of freedom of speech, local initiative, and local leadership. Under such a system, it is the function of the federal government to see that necessary materials are readily available and to assist in the establishment of face-to-face facilities.

(g) One federal agency can do a coördinating job on this kind of information program for all other agencies, given good will, determination, and hard work. When personal or agency ambitions enter, however, the program can be effectively sabotaged in spite of the most carefully drawn plans and charters of responsibility.

(h) The abolition of this war information function by OCD in no way reflects a lessening of the need for the services performed by the Organizations Service Division. In fact, all evidence is to the contrary. A major question before the country is, therefore, where this service should now be established. Strikes, race riots, and extensive polls and studies indicate that many of our people still do not understand the issues of the war and the relation between the war program and individual freedom.

C. Considering the rapidity with which this program took hold and the nation-wide character of the demand for services from the Organizations Service Division, it is difficult to understand why the Division was so abruptly abolished after less than six months of operation. The waste of manpower, funds, and energy involved in recruiting, organizing, and then almost as quickly liquidating the personnel involved will require an explanation some day when the pressures of war permit. Certain contributory factors, however, may be noted briefly:

(a) Politically, this particular information program had been linked in public speeches and in the writings of certain anti-Administration columnists with an alleged fourth-term conspiracy. Congressional appropriation hearings reflected this same opposition.[6]

(b) By June, 1943, there had developed strong opposition in many po-

[6] Hearings, Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 1st Sess., National War Agencies Appropriations Bill for 1944, Part I; Hearings, Subcommittee of the Committee on Appropriations, U.S. Senate, 78th Cong., 1st. Sess., on H. R. 2968.

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litical quarters to any constructive war information program. Under attack were particularly the Office of War Information, the Department of Agriculture, the Office of Education, and the Coördinator of Inter-American Affairs. How closely the OSD was linked to these other agencies has already been described. How strong was the Congressional attack was shown by the questioning of Mr. Landis in the Senate Appropriations Committee, even though he had already capitulated to Congressional pressure by asking for no funds to continue the Division.

The foregoing two factors were probably determining so far as the attitude of Congress was concerned. However, an examination of the House and Senate appropriations hearings indicates a widespread lack of understanding of the rôle of public discussion in the democratic process. In fact, some of the comments suggest lack of faith in the ability of people to arrive at sound conclusions, when they are given access to all the facts. *Telling* people seemed to be preferred to *talking with* them. This view had also been found among some state defense council officials, who argued that it was dangerous to encourage discussion.

A further factor influencing the fate of this program was the failure of OCD to keep Congress informed on the nature of the face-to-face war information activities. It may be that anti-Administration political consideration had doomed this program. However, it is doubtful whether a majority in Congress would have cut off the funds had an effort been made to educate Congress on the subject, as was done by the heads of other agencies in regard to Lease-Lend, Economic Warfare, or Inter-American Affairs.

It is equally doubtful whether Congress would have opposed this program had it known how well the information activities were received throughout the country. Unfortunately, the program was still too new to have permitted communications to Congress about its popularity or protests against its impending abolition.

D. The elimination of this important face-to-face war information service of the federal government leaves a serious gap in the machinery of democratic government in the United States. There is no one place in the national government to which the citizen can go for information about the nation's war activities. There is no official encouragement for citizens to sit down to discuss public policy in traditional democratic "cracker barrel" or "town meeting" fashion. Taken together with the abolition of the forum services of the Office of Education, this means that government, in the United States, has ceased to perform its civic and adult education functions.

In no other important democratic country has a backward step of similar length been taken in the field of public education. And this at a time when the people are making the greatest sacrifices and the most momentous decisions of their entire history!

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RURAL LOCAL GOVERNMENT

COUNTY AND TOWNSHIP GOVERNMENT IN 1942*

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During the first war year, it was to be expected that popular interest in rural local government would be subordinated, in large measure, to problems more directly connected with the national war effort. Nevertheless, vigorous prosecution of the war program has required coöperation on the part of government at all levels; and the impact of that program has been felt in various ways, both directly and indirectly, by local governmental units. Indeed, in surveying county and township government in 1942 one is inevitably impressed by the extent to which developments of the year were either the product of, or at least intensified by, wartime conditions. As in previous reviews,[1] events will be summarized under the following headings: (1) areas; (2) organization and personnel; (3) functions; (4) finance; (5) home rule and optional charters; and (6) intergovernmental relations.

I. AREAS

New York and South Carolina authorized the creation of emergency health and sanitation areas in communities wherein military or naval establishments have given rise to special health problems. These areas are to be established in South Carolina by the state board of health and in New York by the governor upon recommendation by the commissioner of health. When such special areas have been created, it is the duty of local boards of health, or of health officers therein, to make and enforce rules and regulations designed to prevent the introduction of any infectious or contagious disease and to safeguard the public health.[2] Michigan provided for the establishment of emergency protective defense areas in districts in which defense activities or public utilities are situated. A state board consisting of the governor, the adjutant-general, and the commissioner of state police is authorized to create such areas and to make rules regulating therein such matters as use by the public of streets, highways, the air, and waterways. Louisiana, by constitutional amendment and enabling legislation enacted pursuant thereto, empowered police juries to

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[1] See this REVIEW, Vol. 31, pp. 884–913; Vol. 32, pp. 936–956; Vol. 33, pp. 1058–1072; Vol. 34, pp. 1145–1166; Vol. 35, pp. 1106–1119; Vol. 36, pp. 1109–1127.

[2] *Laws of New York*, 1942, ch. 572; *Acts and Joint Resolutions of South Carolina*, 1942, p. 1645. See *infra*, "State-Local Relations."

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establish fire protection districts. In certain Rhode Island communities, fire districts were incorporated by special legislative acts.[3]

The organization of soil conservation districts in rural areas continued apace. By July 1, 1943, 887 such districts had been organized in 42 states. These districts included approximately 2,363,427 farms, embracing some 512,092,000 acres. The six states having no soil conservation districts, as of this date, were Delaware, Rhode Island, Missouri, New Hampshire, Massachusetts, and Connecticut. Of these, the first three had recently enacted enabling legislation, although no districts had yet been organized thereunder. The remaining states were still without enabling laws, although interested individuals and agencies were reported as being hopeful that such legislation would be enacted in the future.[4]

It may be noted that most of the new areas authorized or established were not vested with the taxing power. For the most part, either they were designed to facilitate regulatory activities by existing state or local agencies; or, as in the case of soil conservation districts, though performing services through new agencies, were financed otherwise than by local taxation.[5]

Notwithstanding the authorization and establishment of new districts of various types, there was continued interest in reducing the number of governmental units. Kentucky enacted enabling legislation for the consolidation of adjoining counties. Consolidation is to be effected by petition of five per cent of the registered voters of each county concerned, followed by a favorable vote, at a general election, of a majority of the voters voting on the proposition in each county. The territory formerly embraced within each of the old counties is constituted a special taxing district for the purpose of retiring indebtedness existing prior to the consolidation.[6] The boards of supervisors of seven California counties, by the process of consolidation, reduced by sixteen the number of their judicial townships.[7]

II. ORGANIZATION AND PERSONNEL

The year witnessed some significant developments in matters of local governmental organization; and noteworthy progress was made in per-

[3] *Acts of Louisiana*, 1942 (reg. sess.), nos. 194, 360; *Public Acts of Michigan*, 1942 (1st extra sess.), no. 2; *Acts and Resolves of Rhode Island*, 1942, pp. 475, 480. The Louisiana amendment was approved by the voters in the 1942 general election.

[4] Data supplied by Soil Conservation Service, U.S. Department of Agriculture. See *infra*, "Federal-Local Relations."

[5] Soil conservation districts are financed in part by farmer contributions (frequently in the form of labor, materials, or equipment) and in part by state and federal grants.

[6] *Acts of Kentucky*, 1942, ch. 48.

[7] Frederic L. Alexander, "Consolidation of County Offices," *The Tax Digest*, Vol. 20, pp. 305–306, 315 (Sept., 1942). The counties concerned were Del Norte, Glenn, Kern, Modoc, Nevada, Plumas, and Sierra.

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sonnel administration. Mississippi joined the list of states providing for county defense councils. Virginia abolished the fee system of compensating sheriffs, and provided that hereafter sheriffs shall be paid a salary fixed by a state compensation board within statutory limits.[8]

In Montana, a proposed constitutional amendment which would have lengthened from two to four years the term of office of county attorneys and justices of the peace was rejected by the voters in the November election.[9] A proposed amendment to the charter of Westchester county, New York, intended to provide for a more equitable distribution of voting strength on the county board of supervisors by giving additional votes to members from the more populous districts, was approved by the county board and the state legislature but vetoed by the governor.[10]

Office Consolidation and Abolition. The consolidation of certain county offices was effected in various California counties by their respective boards of supervisors. Thus the offices of sheriff and coroner were consolidated in the counties of Del Norte, Modoc, and Plumas. The same three counties also combined the offices of district attorney and public administrator. The offices of tax collector and treasurer were consolidated in Del Norte and Modoc counties. Del Norte combined the offices of auditor and recorder, and Plumas those of tax collector and assessor. Seven counties, by eliminating sixteen judicial townships through consolidation, eliminated a like number of justices of the peace and constables.[11] Virginia abolished the elective office of constable in magisterial districts and transferred the powers and duties of constables to the county sheriff.[12]

The office of sheriff of the City of New York, in which were consolidated as of January 1, 1942, the functions previously performed by five elective county sheriffs,[13] was reported to be getting off to a good start. Under the new set-up, the sheriff is appointed under the merit system, the first incumbent being chosen from 335 applicants. During the first six months of the year, the office was completely reorganized on a civil service basis. A divisional office under a chief deputy was established in each of the five counties within the city. While maintaining a high standard of service, the number of employees in the office was reduced from 220 to 155, thereby effecting a payroll saving of almost 50 per cent.[14]

[8] *Laws of Mississippi*, 1942, ch. 206; *Acts of Virginia*, 1942, ch. 386.

[9] Letter to the writer from Sam W. Mitchell, secretary of state of Montana, Helena, Dec. 28, 1942.

[10] Elwyn A. Mauck, notes in *National Municipal Review*, Vol. 31, pp. 288, 355 (May, June, 1942).

[11] Frederic L. Alexander, *loc. cit.* See *supra* "Areas."

[12] *Acts of Virginia*, 1942, ch. 285.

[13] See this REVIEW, Vol. 36, p. 1111.

[14] *Municipal Reference Library Notes* (New York Public Library), Vol. 29, pp. 33–34 (Sept., 1943); Elwyn A. Mauck, note in *National Municipal Review*, Vol. 32, pp. 459–460 (Sept., 1943).

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County and Town Executives. Petroleum county, Montana, adopted the manager form of government by popular vote, thereby becoming the first small rural county in the United States to accept the manager plan. Action was taken under an optional manager law enacted by the Montana legislature in 1931 under authority of a constitutional amendment approved nine years earlier. Faced with a shrinking tax base (due in large part to reduced flow of oil wells), and a drastic statutory rate limit, the people of the county apparently hope that inauguration of manager government will result in economies sufficient to enable them to continue operation of their government. The only elective officers will be three county commissioners, who will appoint the manager, and a county attorney. The new form of government became effective on January 1, 1943, bringing to seven the number of American counties now operating under the manager plan.[15]

Manager government was adopted during the year by the Maine towns of Bridgewater, Crystal, Portage Lake, Mechanic Falls, New Portland, and Smyrna; the town of Bennington in Vermont; and Lower Merion township in Pennsylvania. The four Vermont towns of Barre, Hartford, Northfield, and Manchester voted in their annual town meetings to retain the manager plan.[16] Nebraska's voters once again refused to approve a proposed constitutional amendment which would have permitted the enactment of an optional county-manager law.[17]

Personnel Administration. During the first six months of the year, the 55 New York counties which had not previously established civil service systems selected optional plans of personnel administration under the terms of the 1941 statute requiring such selection.[18] Of this number, 48 chose the local civil service commission; two, the county personnel officer; and five, administration by the state commission. The last half of the year witnessed intense activity on the part of the various counties in the classification of positions, the formulation of rules of administration, and the establishment of registers of eligibles. Under the terms of the law, the merit system must be fully operative in all counties of the state by July 1, 1943.[19]

[15] Elwyn A. Mauck, note in *National Municipal Review*, Vol. 31, pp. 460–461 (Sept., 1942); Paul W. Wager, "County Government," *Municipal Year Book*, 1943, pp. 314–318. The other manager counties are Albemarle, Arlington, and Henrico in Virginia, Sacramento in California, Durham in North Carolina, and Monroe in New York. See the manager directory in *Municipal Year Book*, 1943, pp. 536–546.

[16] Orin F. Nolting, "Council-Manager Government" *Municipal Year Book*, 1943, pp. 319–322.

[17] Letter to the writer from Frank Marsh, secretary of state of Nebraska, Lincoln, Dec. 28, 1942. See this REVIEW, Vol. 36, pp. 1112–1113.

[18] See this REVIEW, Vol. 36, p. 1114.

[19] Paul W. Wager, *loc. cit.* The remaining seven of the state's 62 counties con-

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Pursuant to enabling legislation enacted during the preceding year, civil service systems were adopted in the 1942 general election by St. Louis (Duluth) and Ramsey (St. Paul) counties in Minnesota and by Wayne county (Detroit), Michigan.[20] Merit systems were adopted also during the year by Fresno and San Mateo counties in California, and by Burlington and Warren counties in New Jersey.[21]

In authorizing the establishment of joint purchasing units by counties, or cities and counties, the Kentucky legislature provided that the comptroller in charge of purchasing for the governments concerned may also set up a merit system for personnel, except in such cities or counties as may already have adopted a merit system.[22] Maine was added to the growing list of states which provide retirement systems covering local as well as state employees.[23]

III. FUNCTIONS

New Functions. Kentucky counties generally, and certain of Michigan's more populous counties, were authorized to provide fire protection in unincorporated areas.[24] Counties of the former state were empowered also to establish electric power systems. Louisiana parishes were authorized to acquire and operate defense public works projects, or to coöperate with other governmental units in the acquisition and operation of such projects.[25] The Mississippi legislature enacted several statutes conferring new powers upon counties. One such law authorized the incurring of expenditures, within prescribed limits, in connection with national defense projects, and another the purchase of toll bridges for the purpose of operating the structures toll-free. Counties with army training camps were empowered to acquire and operate waterworks, sewerage, and garbage-disposal plants. The provisions of an earlier law authorizing counties of the first and second classes to acquire real estate for the construction of public

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tinue to operate under civil service systems established prior to 1941. Of these, the five counties within New York City are served by the state civil service commission. Nassau county has a local commission, and Westchester county a personnel officer.

[20] Letters to the writer from St. Louis county civil service commission (Duluth, Jan. 11, 1943); Eugene A. Monick, county auditor of Ramsey county (St. Paul, Dec. 30, 1942); Caspar J. Lingeman, county clerk of Wayne county (Detroit, Dec. 29, 1942). See this REVIEW, Vol. 36, pp. 1114–1115.

[21] James M. Mitchell, "Personnel Developments in 1942," *Municipal Year Book*, 1943, pp. 195–198.

[22] *Acts of Kentucky*, 1942, ch. 43. See *infra*, "Functional Consolidation," "Finance." [23] Paul W. Wager, *loc. cit.*

[24] *Acts of Kentucky*, 1942, ch. 22; *Public Acts of Michigan*, 1942 (2nd extra sess.), no. 15. Under the Michigan law, the cost of the service is to be borne in part by the townships concerned.

[25] *Acts of Kentucky*, 1942, ch. 18; *Acts of Louisiana*, 1942 (reg. sess.), no. 27.

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health buildings and clinics were extended by amendment to all counties of the state.[26]

Planning and Zoning. The war seems to be providing a stimulus to county planning and zoning, particularly in communities having defense industries, military establishments, or numerous governmental offices. Crawford county, Pennsylvania, faced with an influx of several thousand workers for employment in a munitions plant, enacted a zoning ordinance applicable to the areas affected. Arlington county, Virginia, established minimum area requirements for apartment houses, and fixed new requirements for off-street parking space for all dwellings and assembly places. Louisville and Jefferson county, Kentucky, set up a city-county planning and zoning commission to place the entire county under a master plan. Several Colorado counties established planning commissions; and regional or city-county commissions were reported to have been established in numerous metropolitan areas.[27] South Carolina enacted legislation empowering counties with more than 70,000 inhabitants to appoint county planning boards and engage in planning activities.[28]

Functional Consolidation. Provision for functional consolidation among local governmental units continued to spread. One of the broadest enabling acts was passed by the Louisiana legislature. The Louisiana law empowers parishes to act jointly with each other, or with municipalities or special districts, in any undertaking which is within the power of the coöperating governmental units. Such joint arrangements may include, but are not limited to, activities concerning: (1) police, fire, and health protection; (2) public utility services; (3) disposal and collection of garbage and other refuse; (4) construction and maintenance of public improvements; (5) recreational and educational facilities; (6) flood control, drainage, and reclamation projects; and (7) the purchase of materials, supplies, and equipment. Agreements for joint undertakings must be in writing; must be approved by ordinance or resolution of the governing bodies of the units concerned; and may provide for a joint committee or other administrative agency to administer their terms. Local governments operating utilities are authorized to enter into agreements for the extension of service beyond their territorial limits to persons, business organizations, or other governmental units.[29]

The voters of Georgia were reported to have ratified a constitutional amendment which empowers counties and other local units to contract

[26] *Laws of Mississippi*, 1942, chs. 194, 195, 212, 219. See *infra*, "Functional Consolidation."

[27] Paul W. Wager, *loc. cit.*; Walter H. Blucher, "Planning and Zoning Developments in 1942," *Municipal Year Book*, 1943, pp. 334–338.

[28] *Acts and Joint Resolutions of South Carolina*, 1942, p. 1631.

[29] *Acts of Louisiana*, 1942 (reg. sess.), no. 246.

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with each other for the use of their respective facilities or services.[30] Mississippi enacted enabling legislation authorizing the creation of regional housing authorities by two or more counties; the coöperation of two or more counties in joint food or cotton stamp programs; and joint action by counties in the purchase of toll bridges. Michigan provided that, in connection with civil defense activities, subdivisions of the state may extend aid to each other in accordance with plans developed between such subdivisions or at the direction of the state council of defense. The same state, in authorizing certain counties to supply fire protection in unincorporated areas, provided that such counties may either purchase their own equipment or, as an alternative, contract with any township, city, or village within the county for fire-protection service.[31]

The Kentucky legislature consolidated the health departments of Jefferson county and the city of Louisville, placing the consolidated department under a board of health composed of the mayor, the county judge, and five members appointed by those two officials jointly.[32] Shelby county, Tennessee, and the city of Memphis were also reported to have organized a city-county health unit.[33]

Kentucky provided that two or more counties, or cities and counties, may enter into compacts for the purpose of establishing joint purchasing units. As mentioned below, Manitowoc county, Wisconsin, and the city of Two Rivers were reported to have inaugurated coöperative purchasing.[34]

IV. FINANCE

A phase of financial administration which has recently been receiving increased attention at the local level is the purchase of materials and supplies. Of special significance among developments in this field are the provisions, now becoming more and more widespread, under which local governments are authorized to make purchases through a state purchasing agency or to coöperate among themselves in the establishment of joint purchasing machinery. During 1942, three states took important steps along these lines. New York provided that the state commissioner of standards and purchase may permit any county, city, town, or village to make purchases through the state purchasing division. Kentucky em-

[30] Letter to the writer from John B. Wilson, secretary of state of Georgia, Atlanta, Dec. 29, 1942. See this REVIEW, Vol. 36, p. 1120. The ratifying election was held in June, 1941.

[31] *Public Acts of Michigan*, 1942 (1st extra sess.), no. 7; *ibid.* (2nd extra sess.), no. 15; *Laws of Mississippi*, 1942, chs. 216, 219, 233. See *supra*, "New Functions."

[32] *Acts of Kentucky*, 1942, ch. 41.

[33] Benjamin G. Horning, "Health Developments in 1942," *Municipal Year Book*, 1943, pp. 351–355.

[34] See *supra*, "Personnel Administration"; *infra*, "Finance."

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powered counties, or cities and counties, to establish joint purchasing units. Where such a unit has been established, supplies are to be procured, under a system of competitive bidding, by a comptroller appointed by a joint commission representing the governing bodies of the counties or cities concerned. The comptroller is required to be a certified public accountant "or its equivalent," and to have had experience in a purchasing division of a city, county, or large private enterprise. Louisiana, in a statute authorizing numerous forms of intergovernmental coöperation at the local level, includes the purchase of materials and supplies among the various activities in the performance of which parishes and municipalities are empowered to act jointly.[35] One instance of coöperative purchasing was reported from Wisconsin, where Manitowoc county and the city of Two Rivers formed a committee to plan the coördination of their purchasing activities.[36]

Certain other legislation in the financial field deserves mention. The voters of Washington approved a statute, which had been enacted by the 1941 legislature subject to popular referendum, imposing a 40-mill over-all rate limit on property taxes. Within this over-all maximum, counties will be subject to a 10-mill maximum, which, however, may be exceeded by three-fifths vote at a referendum election.[37] In Louisiana, a state agency, to be known as the parish highway bond commission, was established with the duty of devising and reporting to the governor and legislature means of relieving parishes from the payment of parish bonds issued for the construction of roads and bridges which were subsequently incorporated into the state highway system. Massachusetts towns were authorized to invest in United States defense bonds.[38]

V. HOME RULE AND OPTIONAL CHARTERS

Preliminary steps in movements for home-rule charters met with success in Montgomery county, Maryland, and with failure in Wayne county (Detroit), Michigan.

Montgomery county, which is one of the two partly-urban Maryland counties adjoining the District of Columbia, acted under a constitutional amendment adopted in 1915. Although this amendment extends the home-rule privilege to every county of the state, no county has yet

[35] *Acts of Kentucky*, 1942, ch. 43; *Acts of Louisiana*, 1942 (reg. sess.), no. 246; *Laws of New York*, 1942, ch. 868. See *supra*, "Functional Consolidation."

[36] Joseph W. Nicholson, "Municipal Purchasing," *Municipal Year Book*, 1943, pp. 251–253.

[37] Letter to the writer from Belle Reeves, secretary of state of Washington, Olympia, Dec. 28, 1942. See this REVIEW, Vol. 36, pp. 1122–1123.

[38] *Acts of Louisiana*, 1942 (reg. sess.), no. 208; *Acts of Massachusetts*, 1942 (spec. sess.), ch. 4.

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adopted a charter thereunder.[39] In the 1942 general election, the voters of Montgomery county voted to frame a charter and elected a five-member charter board to perform that task. This board has drafted a charter providing for a manager plan of government, which will be submitted to the county voters for approval or rejection at the 1944 election.[40]

Recent disclosures of graft and inefficiency have again called attention to Wayne county's archaic government, with its board of supervisors of 160 members and its long ballot. The influx into this metropolitan county of thousands of war-industry workers has created local problems quite beyond the competence of the existing government and has emphasized the need for modernization. In an effort to enable the local electors to reorganize their government, a proposal for a home-rule constitutional amendment was initiated by popular petition and placed on the ballot in the 1942 general election. Proposed amendments which would have extended home-rule powers to all Michigan counties having been twice rejected at the polls within the last decade, the present proposal was limited to the single county of Wayne. A charter drafted under its terms would have been required to provide for a county legislative body of not more than twenty-one members, a chief executive, non-partisan nominations and elections, the initiative and referendum, and the merit system. But notwithstanding its desirable features and limited application, the proposed amendment was defeated by the voters. Ninety per cent of the 310,000 signers of the initiative petition were residents of Wayne county, and the voters of that county gave the proposal a favorable plurality of 77,000 therein. This, however, was not sufficient to overcome the organized opposition of out-state rural politicians. In the state-wide vote, the measure was rejected, although by only a few thousand votes out of a total of more than 800,000. This narrow margin of defeat, together with the substantial plurality in favor of the proposal in Wayne county, would seem to suggest that if the forces of good government are willing to continue their fight, the cause may not prove irretrievably lost.[41]

A proposed amendment to the Nebraska constitution, which would have authorized the enactment of legislation providing the manager system as an optional form of county government, was defeated by the voters in the November election.[42]

[39] A manager charter for Baltimore county was framed under authority of the amendment, but was defeated at the polls in 1920.

[40] See Stella B. Werner, note in *National Municipal Review*, Vol. 32, pp. 207–210 (Apr., 1943); Elwyn A. Mauck, note in *ibid.*, pp. 402–403 (July, 1943).

[41] *Detroit News*, Nov. 3, 1942, p. 1; *ibid.*, Nov. 5, 1942, p. 1; Arthur W. Bromage, "Home Rule for Wayne County?," *National Municipal Review*, Vol. 31, pp. 386–389 (July, 1942); Arthur W. Bromage, note in *ibid.*, p. 636 (Dec., 1942). Notwithstanding the defeat of this amendment, a merit system was inaugurated in the county under the terms of a permissive statute. See *supra*, "Personnel Administration."

[42] See *supra*, "County and Town Executives."

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VI. INTERGOVERNMENTAL RELATIONS

State-Local Relations. The effects of wartime conditions were clearly revealed in intergovernmental relations. Though counties and townships generally are less directly concerned than cities with problems arising from the war, metropolitan counties must assume a share in wartime responsibilities of a local nature, and even rural counties and townships cannot escape the impact of a war economy. Laws of New York and South Carolina authorizing the establishment of emergency health and sanitation areas in communities having military or naval establishments provided that, in case the local health authorities within such areas fail to make and enforce adequate rules and regulations for protection of the public health, the state health authorities shall make and enforce such regulations. For this purpose, the state agencies may assume all the powers and authority conferred by law upon local health officers. Michigan provided for the organization and government of emergency protective defense areas by an ex-officio state board.[43] Less directly connected with the war effort was legislation concerning state-local relationships in financial matters. Thus Louisiana took steps toward state assumption of parish indebtedness incurred in the construction of highways which were subsequently incorporated into the state highway system; and New York provided means whereby local governmental units may purchase materials, supplies, and equipment through the state purchasing agency.[44]

Federal-Local Relations. It is a matter of no surprise, in view of the war emergency, that developments were more marked in federal-local relations than in relations of a state-local character. Several states enacted legislation designed to foster local participation in national defense activities. Massachusetts and Rhode Island authorized local governmental units to contract with the federal government concerning national defense projects. Louisiana empowered local units to acquire and operate defense public works projects, and provided that any political subdivision of the state may coöperate with the federal government by granting thereto the use of local equipment or the services of local employees. Mississippi counties were empowered to make expenditures, within specified limits, in connection with national defense projects; and local governments in Michigan were authorized to accept federal grants in connection with defense activities.[45]

Coöperation of federal-local or federal-state-local character continued in relation to various war-related functions. The federal Office of Civilian

[43] See *supra*, "Areas." [44] See *supra*, "Finance."

[45] *Acts of Louisiana*, 1942 (reg. sess.), nos. 11, 27; *Acts of Massachusetts*, 1942 (spec. sess.), ch. 4; *Public Acts of Michigan*, 1942 (1st spec. sess.), no. 12; *Laws of Mississippi*, 1942, ch. 194; *Acts and Resolves of Rhode Island*, 1942, p. 195.

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Defense continued to encourage the organization of local defense councils; to establish minimum standards for the training of council personnel; and, through federal-local agreements, to lend to the local organizations various equipment such as fire-fighting apparatus and gas masks. The United States Public Health Service assisted local authorities in maintaining proper sanitation facilities in military, naval, and war-industry areas. In some Western states, county welfare departments supplied case workers to assist the federal government in evacuating Japanese.[46]

The United States Department of Agriculture continued its program of extending aid in the form of technical assistance, materials, and equipment to local soil conservation districts organized pursuant to state law. On July 1, 1943, the department had entered into memoranda of understanding with 827 such districts including approximately 484,155,000 acres.[47] This probably means that one-third or more of the farms of the country are now located in soil conservation districts receiving federal assistance.[48]

In the Tennessee Valley states, the T.V.A. continued to make payments to counties for the replacement of taxes lost by the transfer of private power facilities to the Authority. It has been suggested in this connection that, unless some of these states take effective measures to stop current financial abuses on the part of recipient counties, Congress may eventually feel moved to inaugurate a system of supervision designed to assure that the federal payments will not be squandered.[49]

[46] See Arthur W. Bromage, "Federal-State-Local Relations," this REVIEW, Vol. 37, pp. 35–48 (Feb., 1943).

[47] Data supplied by Soil Conservation Service, U.S. Department of Agriculture. See *supra*, "Areas."

[48] Cf. *United States Government Manual*, Fall, 1942, p. 293.

[49] See Alexander T. Edelmann, "The T.V.A. and Inter-Governmental Relations," this REVIEW, Vol. 37, pp. 455–469 (June, 1943).

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INTERNATIONAL AFFAIRS

THE LAW AND PROCEDURE OF WAR CRIME TRIALS

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In the preparation of the trials for "war crimes" committed during the present global conflict, students of international law will indeed recognize that a milestone in the development of legal science has been reached. As will become apparent from some of the facts to be presented in this study, we are about to see a new legal principle adopted in international relations: *Impossibile est quod universitas delinquat.* In consonance with various plans for general postwar reconstruction,[1] the principle so succinctly phrased by Pope Innocent IV, in times no less perturbed than the present, is finally defeating the entrenched adherents of its counterpart, first enunciated by the skilled Bartolus of Saxeferato.[2] Individual criminals

[1] Cf. President Roosevelt's message of September 17 to Congress on the progress of the war (*New York Times*, Sept. 18, 1943, p. 4). In his letter of August 25, transmitting the quarterly lend-lease report as required by Congress, the President stated: "Except for the responsible Fascist leaders, the people of the Axis need not fear unconditional surrender to the United Nations . . . " (*ibid.*, Aug. 26, 1943, p. 11). Vice-President Wallace expressed similar views when listing "the immediate objectives of the common man" in his address of September 11, in Chicago, before a meeting held under the auspices of the United Nations Committee to Win the Peace (*ibid.*, Sept. 12, 1943, p. 32). Cf. the Vice-President's commencement speech at the Connecticut College for Women on June 6 (*ibid.*, June 7, 1943, p. 7). See also the radio address by Secretary of State Cordell Hull, on September 12, outlining the policies of the State Department (*ibid.*, Sept. 13, 1943, p. 4). On the anniversary of the German invasion of Poland four years earlier, the British and American Governments again proclaimed their intention to see the atrocities in Poland atoned for. Secretary Hull stated on that occasion: "The United States Government reaffirms its resolve to punish the instigators and actual perpetrators of these crimes . . ." (*ibid.*, Aug. 30, 1943, p. 3). Under-Secretary of State Sumner Welles, at Arlington, May 30, 1942: " . . . But I believe they [the men who will make our victory possible] will likewise wish to make certain that no element in any nations shall be forced to atone vicariously for crimes for which it is not responsible, and that no people shall be forced to look forward to endless years of want and starvation" ("War and Peace Aims. Extracts of Statements of United Nations Leaders," *Special Supplement No. 1 to United Nations Review*, Jan. 30, 1943, p. 32). Cf. Quincy Wright, "Human Rights and World Order," *International Conciliation*, Apr., 1943 (No. 389), pp. 238–262, *passim.*

[2] An interesting appraisal of the principle that a "universitas" cannot commit a crime and reasons for the failure hitherto to adopt it in the realm of international affairs are presented by Professor Hocking in *Man and the State* (New Haven, 1926), pp. 355 ff. Pope Innocent IV gave practical expression to his sentiments by explicitly

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and their accomplices are to be held responsible, not "nations" or peoples.[3]

forbidding the excommunication of corporate bodies at the Council of Lyon in 1254 (in c.5, VI° 5, 11). Otto Gierke, *Das deutsche Genossenschaftsrecht* (Berlin, 1868, 1873, 1881, and 1913), has indicated the sway which the principle espoused by Innocent IV and that espoused by Bartolus (rather sweeping acceptance of vicarious responsibility) have held, with various modifications in the narrower and wider realms of law (Vol. 2, pp. 817–820; Vol. 3, pp. 234–236, 342–349, 402–410, 491–497, 738–744; Vol. 4, pp. 8, 19–20, 44–45, 78–79, 93, 96–103 *passim*, 140–142, 258–260, 359–360, 528). The position of the classical writers in international law on the choice between individual and corporate (criminal) responsibility in their particular discipline forms part of a study now under preparation by the author of this article.

[3] "It is not the intention of this Government or of the Governments associated with us to resort to mass reprisals," and "the number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy population" (*Department of State Bulletin*, Oct. 10, 1942, Vol. 7, p. 797, quoted by G. A. Finch, in "Retribution for War Crimes," *Amer. Jour. of Internat. Law*, Vol. 37 (1943), at p. 84). That this involves no less than the separation for punishment of a "guilty" government or "guilty" leaders from their "innocent" or misled populace has been well recognized by writers of the Third Reich. E.g. Carl Schmitt, "Die Wendung zum diskriminierenden Kriegsbegriff," *Schriften, Akad. f. Deutsches Recht*, Gruppe Völkerrecht No. 5 (Munich, 1938), pp. 45 ff.

Public opinion in the United States generally appears to support the Government's policy on this question. Cf. Mgr. John A. Ryan, director of the National Catholic Welfare Conference, writing in the St. Louis *Post-Dispatch* for Feb. 27, 1943, that punitive measures upon the entire Axis populations would be "at once unwise and difficult to justify," but declaring that "the men responsible for the dastardly attack upon freedom and civilization should not be permitted to go free after the war; they should get what is coming to them" (*New York Times*, Feb. 28, 1943, p. 17). On April 29, in a statement entitled "Retributive Justice after the War," the ethics committee of the Catholic Association for International Peace declared: " ... The 'imputation theory,' which holds that all members of a political community automatically share the guilt of their criminal rulers is illogical and immoral" (*ibid.*, Apr. 30, 1943, p. 23). See also the joint declaration of July 3 by the German-speaking branch of the Social-Democratic Federation of America and the German Labor Delegation in the United States (*ibid.*, July 4, 1943, p. 11); Senator Warren R. Austin's address before the Republican Party Post-War Policy Association, which met in New York on July 19 (*ibid.*, July 20, 1943, p. 1); the recommendations of the panel on military affairs, headed by Rear Admiral Yates Sterling Jr., retired, of the Emergency Conference to Save the Jewish People of Europe, formulated in New York on July 21 (*ibid.*, July 22, 1943, p. 7); the resolution passed by the Lions Clubs on July 22, at the close of their annual international convention in Cleveland (*ibid.*, July 23, 1943, p. 6); the joint statement of the views of organized labor, addressed to Secretary of State Hull on September 24 by President William Green of the American Federation of Labor, President Philip Murray of the Congress of Industrial Organizations, President David Dubinsky of the International Ladies Garment Workers Union, and Chairman Adolph Held of the Jewish Labor Committee (*ibid.*, Sept. 25, 1943, p. 6). Cf. also Mr. Murray's statement of December 25, 1942, issued "in the full knowledge that it reflects the thought and feeling of millions of our fellow-workers," and asking that "the Axis murderers" be "tried and punished with the utmost severity" (*ibid.*, Dec. 26, 1942, p. 4).

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The "civil liability" of a state to make reparation for an injury inflicted by those for whose actions it is responsible upon another state or its subjects is here not at issue.[4] The proposed trials are concerned with criminal responsibility, determined in accordance with the maxim *actus non facit reum nisi mens sit rea.*[5] Only an individual (natural person) possesses a mind which may be filled with "vicious intent" at will. "Nations" or peoples, as entities, cannot have such a (collective) mind, and therefore cannot commit "crimes." Napoleon Bonaparte recognized this shrewdly when he observed that "les crimes collectifs n'engagent personne."[6] But the very purpose of modern criminal law and procedure is bound up with avoiding the extension of vicarious responsibility as well as bringing the full force of the law to bear upon the individual who committed the criminal act with a *mens rea.* The United Nations will therefore hold individuals responsible first of all for the violations of the laws of war which the latter have committed. Yet beyond this, individuals will also be held responsible for crimes against humanity, *i.e.*, crimes differing from those under the laws of war, but none the less equally well established in law. Likewise, these "crimes against humanity" radically differ from the "war crimes" in the dockets of 1919. "War guilt" now is also relegated to the realm of oratory, and the courts are to look only at "concrete" crimes.

The preparatory work for the trials of war criminals is now well under way. In their declaration of January 13, 1942, the representatives of the Governments-in-Exile meeting in London placed "among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible" not only for war crimes, but for "acts of

[4] For this established doctrine in international law, cf. Clyde Eagleton, *The Responsibility of States in International Law* (New York, 1928).

[5] A modern interpretation of the principle of *mens rea* is furnished by Francis B. Sayre, in "The Present Significance of *Mens Rea* in the Criminal Law," *Harvard Legal Essays 1934* (Cambridge, 1934), p. 399. Professor Mannheim has justly lamented the view which international lawyers have generally taken in the past: "The whole conception of 'crime' is foreign to the theory and practice of international law. Crime, even in national law, is applicable only to the action of 'natural persons'; the 'composite person,' the 'body corporate,' cannot be possessed of that 'guilty mind' which is still in general an essential element of crime." *War and Crime* (London, 1941), p. 174, quoting the *Report on International Sanctions*, published by the Royal Institute of International Affairs in 1938. This traditional view would make it appear as though we were still in a rather primitive stage of development as regards the treatment of crime in international relations. The community of nations, however, appears to have developed to a sufficient degree in (all) other respects that an international criminal law and procedure could now be instituted. That crimes thereunder can be properly defined, and that individuals are subjects of international law, are prerequisites which will be considered subsequently in this study.

[6] As quoted by Scipio Sighele, in *La Folla Delinquente* (Turin, 1895), p. 110.

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violence thus inflicted upon the civilian populations [which] have nothing in common with the conceptions of an act of war or of a political crime as understood by civilized nations . . . ."[7] On October 7, 1942, it was announced simultaneously in Washington by President Roosevelt and in London by the Lord Chancellor in the House of Lords that the Governments of the United States and Great Britain had agreed upon a proposal to establish a United Nations Commission for the Investigation of War Crimes.[8] A week later, on October 14, 1942, V. M. Molotov, People's Commissar for Foreign Affairs, declared that the Government of the U.S.S.R. had the intention to pursue a similar course.[9] More recently, various announcements were made by spokesmen of the United Nations to the effect that the material for the prosecutions is being carefully assembled.[10] Some uncertainty, however, appears to exist as to the forum in which the proposed trials should take place, and concerning the procedure to be followed once the forum has been decided upon.[11]

[7] *New York Times*, Jan. 14, 1942, p. 6, quoted by Finch, *op. cit.*, p. 85. Earlier official statements on the determination of the United Nations to call the perpetrators of atrocities and war crimes to account at the proper time are summarized in "War and Peace Aims, etc.," *op. cit.*, pp. 31–33.

[8] Finch, *op. cit.*, p. 84. [9] *Ibid.*, p. 86.

[10] Details may be found under "Texts and References" in recent issues of the monthly *United Nations Review.*

[11] When Rudolf Hess took up residence in the British Isles, the Russian Commissar for Foreign Affairs was among those who called for an immediate trial of any responsible Nazi leader upon capture, while the majority of the United Nations statesmen preferred to hold trials at the end of the present conflict and possibly before an international tribunal. "The War Criminals" (*Spectator*, Oct. 23, 1942, Vol. 169, pp. 375–376). (For the first comprehensive official account of the Hess episode, see the statement made by Secretary of State for Foreign Affairs Eden in the House of Commons on September 22 (*New York Times*, Sept. 23, 1943, p. 10). This statement was timed to coincide with efforts to pave the way eventually for a Roosevelt-Churchill-Stalin conference.) As regards the forum for war crime trials, the following may illustrate the diversity of extant views:

Russia: Inter bellum-trials as called for by Commissar Molotov could take place only before national tribunals. Cf. note 12, *infra*. The Russian press has since repeatedly echoed Commissar Molotov's views, *e.g.*, in the editorials on the execution of eight Russian traitors at Krasnodar in the summer of 1943 (*New York Times*, July 19, 1943, p. 6, and July 20, 1943, p. 5). On the other hand, Professor A. N. Trainin, outstanding criminologist of the Moscow Law College and author of one of the principal essays to appear in a symposium on war crime trials now in preparation by the Institute of Law of the Academy of Sciences of the U.S.S.R., desires to provide for both national and international courts to deal with the war criminals. See N. Elizov, "Soviet Jurists Study Question of Prosecution of Hitlerites for War Crimes," *Information Bulletin*, Embassy of the U.S.S.R., Washington, D.C., Dec. 5, 1942, No. 145, p. 5.

Great Britain: In the debate on war crime trials, precipitated by the former Lord Chancellor, Viscount Maugham, in the House of Lords on October 7, 1942, Viscount Simon, present Lord Chancellor, as well as Lord Maugham and the Marquess of

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I. WAR CRIME TRIALS AFTER THE FIRST WORLD WAR

At the conclusion of the first World War, the Preliminary Peace Conference appointed on January 25, 1919, a Commission on the Responsi-

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Crewe, favored some kind of national (military) court for postwar proceedings (*New York Times*, Oct. 8, 1942, p. 11). Cf. also note 8, *supra*. Writing early in 1943, Viscount Sankey likewise preferred trials by national courts, or national courts *and* a special court ("War Criminals," *The Fortnightly*, Jan., 1943, No. 913 [New Series], p. 4, at p. 5). On February 18, Viscount Simon stated that while the British Government was prepared to discuss the setting up of international courts in addition to the United Nations Commission for the Investigation of War Crimes, he felt that trial by military tribunals would prove the better system (*New York Times*, Feb. 19, 1943, p. 10). Hector Munro presented the argument for an international tribunal in "War Crimes and Criminals," *The New Commonwealth*, May, 1943, Vol. 8, p. 224, at pp. 225–226. On July 9, 1943, Sir Cecil Hurst, judge of the Permanent Court of International Justice since 1929 and its president in 1934, was appointed the British member of the United Nations Commission for the Investigation of War Crimes (*New York Times*, July 10, 1943, p. 6). Sir Cecil's instructions concerning the forum question, however, had not been made public at the time of this writing.

United States: At the end of 1942, it was rumored that an international (criminal) court was about to be established (in London) and that Professor Sheldon Glueck, criminologist of Harvard University and member of the Advisory Committee to the United States Supreme Court on Rules of Criminal Procedure, was favored by the President and the Secretary of State as candidate for the post of consulting adviser to this court. Official quarters in Washington, however, did not confirm this rumor (*New York Times*, Dec. 29, 1942, p. 3). On June 29, 1943, the White House announced the appointment of the Hon. Claiborne Pell, former American minister to Portugal and Hungary, as the representative of the United States on the United Nations Commission for the Investigation of War Crimes. In the announcement, hope was expressed "that the Commission, which will have its headquarters in London, will be able to take concrete steps looking to the punishment of agents of the Axis powers who have perpetrated atrocious crimes against their innocent victims" (*Department of State Bulletin*, July 3, 1943, Vol. 9, p. 3; *New York Times*, June 30, 1943, p. 16). It may appear doubtful, however, whether the United States Government at present favors the establishment of an international tribunal by, or in addition to, this Commission, since the President warned, on July 30, 1943, "that the time will come when they [the (Axis) war criminals] shall have to stand in *courts of law in the very countries which they are now oppressing* and answer for their acts" (*ibid.*, July 31, 1943, p. 3). Italics supplied. Cf. also George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," *Amer. Jour. of Internat. Law*, Vol. 37 (1943), p. 407. Among the advocates of trials before an international tribunal, other than those cited subsequently in this study, can be mentioned Senator Elbert D. Thomas, "What We Must Do with the War Criminals," *The American*, Feb., 1943, p. 88, and Professor Clyde Eagleton, "Punishment of War Criminals by the United Nations," *Amer. Jour. of Internat. Law*, Vol. 37 (1943), p. 495. Cf. also Professor Max Radin's interesting "preview," *The Day of Reckoning* (New York, 1943).

China: The plan for the punishment of Japanese war guilty outlined by Dr. Sun Fo, president of the Legislative Yuan of the Chinese Government in Chungking, does not provide for any type of court, but for acts of high policy (*New York Times*

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bility of the Authors of the War and on the Enforcement of Penalties. This Commission of Fifteen reported its findings early in April, 1919, on three main questions: the responsibility of the authors of the war, the violations of the laws and customs of war, and the question of personal responsibility of particular members of the enemy forces. The concluding chapter of the Commission's report contained a draft scheme for the establishment of an appropriate tribunal to deal with the charges suggested by the Commission.[12]

Magazine, July 11, 1943, pp. 10, 38). For its American counterpart, cf. note 43, *infra*. The Chinese plan does not deal with the European enemies of the United Nations.

Governments-in-Exile: Among these, the Polish Government-in-Exile has been pictured as intending to hold trials of the war criminals in Polish municipal courts, while no mention was made of any intentions of the United Nations to hold such trials before an international tribunal jointly. Bernet Hershey, "Hang the Führers!" (*Saturday Evening Post*, June 12, 1943, pp. 16 ff.)

Such accounts as the last-quoted might compel us to attempt holding World War II trials with a World War I public opinion; or, if we should really repeat the procedure eventually employed after the last war (trials before national tribunals alone), we may again witness a general failure of the prosecutions and such painful cases as that of General Nathusius in 1924–25. Cf. Arnold J. Toynbee, *Survey of International Affairs, 1924* (Oxford, 1926), pp. 401–403.

[12] *Violations of the Laws and Customs of War.* Carnegie Endowment for International Peace, Div. of International Law, Pamphlet No. 32 (Oxford, 1919). It will be noted that this Commission was established by the victorious Powers *after* the Armistice, and that the prosecutions which the Commission was to recommend later were to take place *after* the conclusion of the Treaty of Peace. In other words, the victors intended to hold the war crime trials at a time when customary international relations had been restored sufficiently to forbid the victors unlimited interference with their defeated enemy's internal affairs. Prosecutions and trials for war crimes thus depended from the outset upon the good-will and coöperation of the defeated enemy. In case of refusal on the part of the former enemy to coöperate, the victors could only choose between compromise (which meant virtual acquiescence in the refusal) and reopening of hostilities to secure compliance.

Only at the time of the armistice can the victor(s) make his (their) enforcement of the law and the judicial administration of punishment effective. This appears to have been recognized in the present conflict, since the organization of the United Nations Commission for the Investigation of War Crimes was begun while hostilities were still in progress, and the trials seem to be scheduled to take place upon the conclusion of the armistice or the surrender of the enemy. Said the Lord Chancellor in the House of Lords on October 7, 1942: "Named criminals wanted for war crimes should be caught and handed over at the time of, and as a condition of, the armistice, with the right, of course, to require the delivery of all others as soon as supplementary investigations are completed" (*London Times*, Oct. 8, 1942, p. 8, quoted by Finch, *op. cit.*, pp. 85–86). Cf. also *New Statesman and Nation*, Oct. 17, 1942, Vol. 24, No. 608, p. 249, and notes 8 and 11, *supra*. The foregoing applies only to trials which the United Nations may prepare to hold before an international tribunal. While the war is still in progress, the belligerents can try and punish singly, but fighting must cease before communications can be sufficiently reëstablished to permit the

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In the first part of its report, the Commission found that "the war was premeditated by the Central Powers together with their Allies . . . ," and that the neutrality of Belgium and Luxembourg, guaranteed by treaties,[13] had been "deliberately violated."[14] These charges then concerned the pursuit by the Central Powers of an aggressive policy. Censure in this case was at best a high diplomatic act of the Allied and Associated Powers, for war as an instrument of national policy was not outlawed at the time.[15] Better actionable at law appeared to be the Commission's compilation of "The Facts of the Breaches of the Laws and Customs of War Committed by the Forces of the German Empire and Their Allies on Land, on Sea, and in the Air." After considering a large number of documents, the Commission supplied the following summary list of crimes committed by the enemy during the war:

"Murders and massacres, systematic terrorism; putting hostages to death; torture of civilians; deliberate starvation of civilians; rape; abduction of girls and women for the purpose of enforced prostitution; deportation of civilians; internment of civilians under inhuman conditions; forced labour of civilians in connection with the military operations of the enemy; usurpation of sovereignty during military occupation; compulsory enlistment of soldiers among the inhabitants of occupied territory; attempts to denationalize the inhabitants of occupied territory; pillage; confiscation of property; exaction of illegitimate or of exorbitant contributions and requisitions; debasement of the currency, and issue of spurious currency; imposition of collective penalties; wanton devastation and destruction of property; deliberate bombardment of undefended places; wanton destruction of religious, charitable, educational, and historic buildings and monuments; destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew; destruction of fishing boats and of relief ships; deliberate bombardment of hospitals; attack on and destruction of hospital ships; breach of other rules relating to the Red Cross; use of deleterious and asphyxiating gases; use of explosive or expanding bullets, and other inhuman appliances; directions to give no quarter; ill-treatment of wounded and prisoners of war; employment of prisoners of war on unauthorized works; misuse of flags of truce; poisoning of wells."[16]

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arrangement of the trial of war crimes before an international court. The United Nations appear to have reserved for trial before an international tribunal at least those cases where the individuals involved are "wanted" by more than one state, and/or where the crimes were committed on the enemy's own territory to overcome special problems of local jurisdiction. Cf. the statement on atrocities, signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin, and published on the occasion of the Moscow Conference; note the reservation contained in the last paragraph of the declaration. *New York Times*, Nov. 2, 1943, p. 14.

[13] The neutrality of Belgium was guaranteed by the treaties of Apr. 19, 1839, and that of Luxembourg by the treaty of May 11, 1867.

[14] *Violations of the Laws and Customs of War, op. cit.*, p. 16.

[15] The violation of Belgian neutrality, however, may be said to have been subject to more than moral censure. Cf. Quincy Wright, "The Outlawry of War," *Amer. Jour. of Internat. Law*, Vol. 19 (1925), at p. 86, n. 44.

[16] *Ibid.*, pp. 17–18.

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The third part of the Commission's report dealt with "The Degree of Responsibility for these Offenses attaching to particular Members of the Enemy Forces, including Members of the General Staffs and other Individuals however highly placed." The investigators saw no reason "why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal."[17]

Finally, the Commission outlined the constitution and procedure of an appropriate tribunal to deal with the violations of the laws and customs of war and the laws of humanity.[18] It is interesting to note, however, that the Commission did not recommend that the charges against the authors of the war (for the commission of political acts such as violations of neutrality) be prosecuted before a tribunal: Only a formal declaration condemning the "gross outrages upon the law of nations and international good faith" was asked of the Peace Conference, and it was left open to the latter to resort to political measures of its choice. The Commission of Fifteen then added: "It is desirable that in the future penal sanctions be provided for such grave outrages against the elementary principles of international law."[19]

Regarding the violations of the laws and customs of war, listed in the second part of the report, it was recognized that "each belligerent has, or has the power to set up, pursuant to his own legislation, an appropriate tribunal, military or civil, for the trial of such cases."[20] Even for these

[17] *Ibid.*, pp. 19–20. This applied to violations of the laws of war. The Commission of Fifteen made also special provision for the possibility of trying the ex-Kaiser before a High Tribunal. Consent of the German Government to this procedure was to be secured by articles in the Treaty of Peace. For the law on the subject, cf. Quincy Wright, "The Legal Liability of the Kaiser," in this REVIEW, Vol. 13 (1919), pp. 120–128. [18] *Violations of the Laws and Customs of War, op. cit.*, pp. 23 ff.

[19] *Ibid.*, p. 23.

[20] *Ibid.*, The law on this particular aspect of the question of war-crime trials has not materially changed since the first World War. Cf. A. Mérignhac and E. Lémonon, *Le Droit des Gens et la Guerre de 1914–1918* (Paris, 1921), Vol. 2, pp. 590 ff.; James W. Garner, *International Law and the World War* (London, 1920), Vol. 2, p. 474 ff.; George A. Finch, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes," *Amer. Jour. of Internat. Law*, Vol. 14 (1920), p. 218. Also Elbridge Colby, "Court-Martial and the Laws of War," *ibid.*, Vol. 17 (1923), p. 109, and the review of law and past practice in the *per curiam* decision of the Supreme Court of the United States in the case of the German saboteurs, rendered on July 31, 1942, and reprinted in 37 *ibid.* (1943), p. 152 ff. Specific comments on this decision are furnished by one of the authors of the Government's brief, Robert E. Cushman, "*Ex parte* Quirin *et al.*, The Nazi Saboteur Case," *Cornell Law Quarterly*, Vol. 28 (Nov., 1942), p. 54, and by F. Granville Munson, "The Arguments in the Saboteur Trial," *University of Pennsylvania Law Review*, Vol. 91 (Nov., 1942), p. 239. Of a more general nature is the article by George Gordon Battle, "Military Tribunals," *Virginia Law Review*, Vol. 29 (Dec., 1942), p. 255.

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crimes, it was believed that trials before an international tribunal would avoid "much complication and delay." But the following charges were to be part of proceedings before an international tribunal exclusively:

"(a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations congregated, or the crime of forced labour in mines where prisoners of more than one nationality were forced to work;

(b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battlefront, but whose orders affected the conduct of operations against several of the Allied armies;

(c) Against all authorities, civil and military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of States who ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws and customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators);

(d) Against such other persons belonging to the enemy countries as, having regard to the character of the offence or the laws of any belligerent country, it may be considered advisable not to proceed before a court other than the High Tribunal hereafter referred to."[21]

Consequently, the Commission recommended the creation of a High Tribunal of three judges each of American, British, French, Italian, and Japanese nationality, and of one judge each of Belgian, Greek, Polish, Portuguese, Roumanian, Serbian, and Czechoslovakian nationality. The enemy was to agree in the treaty of peace to the jurisdiction not only of the several national tribunals of the Allied Powers, but also to that of the High Tribunal so defined, and was to be required to coöperate by delivering up wanted persons sojourning in his jurisdiction as well as documentary material in his possession and of value for the prosecutions. The Allied and Associated Powers were to "adopt such legislation as may be necessary to support the jurisdiction of the International Court, and to assure the carrying out of its sentences." Neutrals were to be requested to surrender wanted persons who might be in their territories at the time.[22]

The Commission's report was accompanied by two memoranda containing certain reservations made by the American and Japanese representatives. The American jurists first of all pointed out that the Commission's majority had been inconsistent in declaring formerly high officials of the enemy subject only to political censure for their authorship of the war, but subject to actual court proceedings for violations of the laws and customs of war which they had "indirectly" committed. The American memorandum agreed with the majority report in that political (diplomatic) acts were (then) only subject to political sanctions; but it

[21] *Violations of the Laws and Customs of War, loc. cit.*, and p. 24. [22] *Ibid.*

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denied the validity of the principle of "indirect responsibility" (criminal responsibility for failure to prevent the violations of the laws and customs of war).[23]

Another American contention was that the majority had rightly recommended prosecution and punishment of the (actual) violations of the laws of war; and here it was a matter of expediency whether a United or Mixed Tribunal, consisting of a union of national military tribunals of the victorious Powers, or the various national civil and military tribunals should deal with the matter separately. But the Americans objected to classifying the violations of the laws of war together with the "violations of the laws of humanity." The latter, they held, were a "standard varying with the individual."[24] There was a law for violations of the established rules of warfare; thus a tribunal could apply it. But there was none certain for the protection of the right of humanity: therefore, a High Tribunal with powers to adjudge both kinds of violations, as proposed by the majority of the Commission, appeared to the Americans to lack half of its foundation.

The Japanese representatives on the Commission doubted that international law recognized a penal law as applicable to those who had been declared guilty, and in any event, found it important "to consider the consequences which would be created in the history of international law by the prosecution for breaches of the laws and customs of war of enemy heads of States before a tribunal constituted by the opposite party."[25]

In its final form, the Treaty of Versailles, concluded on June 28, 1919, contained the "trial" Articles 227–230.[26] Under Article 227, the ex-Kaiser

[23] *Ibid.*, pp. 56 ff.

[24] *Ibid.*, p. 64. Cf. also the study of George A. Finch, *Memorandum Regarding the Responsibility of the Authors of the War and for the Crimes Committed in the War*, in David Hunter Miller, *My Diary at the Conference of Paris*, Vol. 3, p. 458 (Document No. 213). The length, however, to which such arguments in the realm of international law are driven can spell either progress or doom of the science. If we are working in the direction of a "world law" (and more will be said of this anon), we must crystallize rather than criticize the concept of the laws of humanity. Otherwise we might unwittingly furnish support to the opponents of a better organization of the world community for the maintenance of peaceful relations between the several states, *e.g.* to those writers who would base the conduct of their state's foreign policy upon rights of "superior" over "inferior" races: ". . . Das Massgebende ist die Zurückführung allen Rechtes in einer gemeinsamen Rechtsordnung auf die Vernunftvorstellungen der einzelnen Menschen ohne Unterschied der Rassen. Es wurde jedoch schon . . . gezeigt, dass bei der Mannigfaltigkeit der rassischen Zusammensetzung der Menschheit und der infolgedessen lebensgesetzlich (biologisch) bedingten Verschiedenheit in der Denkweise der einzelnen Völker ein gemeinsames Rechtsgefühl unter allen Menschen undenkbar ist. . . ." Werner R. Lindner, *Die Strafe im Völkerrecht* (Frankfurt, a.M., Dissert., 1934), p. 39.

[25] *Violations of the Laws and Customs of War*, *op. cit.*, p. 80.

[26] Reprinted in *Amer. Jour. of Internat. Law*, Vol. 13 (1919), Supplement, p. 250.

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was to be arraigned before a special tribunal "for a supreme offense against international morality and the sanctity of treaties." Yet this was but a political, not a criminal, proceeding, and extradition from his refuge in Holland of the former enemy sovereign could not be had, now that the Treaty of Peace had been concluded and the accused was to be tried in London.[27] Article 228 compelled Germany to recognize the right of the victorious Powers to bring the war criminals of the Central Powers to trial at this time, and obliged Germany to hand over such culprits as the Allies might specify.[28] Under Article 229, persons guilty of criminal acts against members of the forces of the Allied and Associated Powers were to be subject to the military tribunals of the Power whose subjects they had injured; in case that the injured persons belonged to more than one of the Allied and Associated Powers, the culprits in question were to be brought before military tribunals composed of representatives of the various Powers concerned. In Article 230, Germany was obliged to furnish the documents requisite for effective prosecution.

Article 228 had contained the provision that the Allies' right to try the war criminals was recognized "notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies." Ironically enough, in the end not only did no trials of the projected nature take place in any Allied court,[29] but, upon the insistence of the German delegation to the Peace Conference and the arrangement of special German legislative provisions, the only trials which did take place were held in Germany.[30] Out of the 850–900 accused in the original Allied list, finally a test list of 45 cases was submitted to the German Government; twelve trials were actually held in the *Reichsgericht*, with resulting convictions in only six cases.[31]

The reasons for this colossal failure have been variously characterized,

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Cf. the preceding with Articles 173 in the Treaty of Peace with Austria, 118 in the treaty with Bulgaria, and 157 in the treaty with Hungary. L. Oppenheim, *International Law* (London, 1940), 6th ed. by H. Lauterpacht, Vol. 2, p. 453, n. 2.

[27] George A. Finch, "Retribution for War Crimes," *op. cit.*, p. 83, n. 4.

[28] The effects of this and the following Articles of the Treaty of Versailles have recently been reviewed by Sheldon Glueck, in "Trial and Punishment of the Axis War Criminals," *Free World* (Nov., 1942), Vol. 4, p. 140.

[29] This refers mainly to trials before Allied joint military tribunals, not to the very small number of trials which actually did take place, for instance, in French (military) courts during and at the end of the war. James W. Garner, *op. cit.*, pp. 487 ff.

[30] Cf. "German War Trials. Report of Proceedings before the Supreme Court in Leipzig," Cmd. 1450 (London: His Majesty's Stationery Office, 1921). Interesting background material may be found in H. W. Temperley, *History of the Peace Conference* (London, 1920–1924), Vol. 2, pp. 304–308, and Ernst J. Cohn, "The Problem of War Crimes Today," *Transactions, Grotius Society*, Vol. 26 (1940), p. 125.

[31] Cmd. 1450, Appendix II, pp. 18 ff. Sheldon Glueck, *op. cit.*, p. 142.

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but the crux of the matter appears to have lain in the fact that official preparations for the war crime trials were not begun until sometime after the Armistice, and that the actual trials were scheduled to be held only after the conclusion of the Treaty of Peace.[32]

II. THE PRESENT SIGNIFICANCE OF THE PACT OF PARIS

Although, perhaps under the impact of unprecedented atrocities, preparations for war crime trials have been begun much earlier in the present conflict, Professor Glueck has pointed out that

> "A fully implemented program of political policies, international conventions, and appropriate modifications of the criminal law of the various countries coöperating as the United Nations needs to be worked out *now*, in order to give the executives and legislatures of the interested nations ample time to study and debate the necessary conventions setting up the [international] court and providing an international penal code; in order, further, to avoid possible arguments regarding "retroactivity"; and in order, finally, to have the whole scheme and apparatus of criminal justice, including the procedural rules, ready when the war is over. . . ."[33]

These remarks encourage the following considerations: The only alternative to reprisals vis-à-vis an enemy who conducts his military campaigns with cruelty far in excess of the exigencies of the situation and the generally accepted limits of military necessity would be for a belligerent to provide for the observance of the laws and customs of war through judicial procedures.[34] During the war, reprisals, for fear of the enemy's counter-measures, can only be limited and, concomitantly, their effectiveness can only be limited. Likewise, in the present global conflict, attempts by any one member of the United Nations to try war crimes singly while fighting is still in progress would constitute an inadequate application of a local process, under the circumstances closely akin to the nature of reprisals. Once the war has been won and acts can be dealt with by the United Nations jointly, the choice will be a more definite one: retaliation against the already prostrate enemy, or trials. If the feelings of "just vengeance" have died down sufficiently or can be "funneled off" by prompt measures, trials will at once appear preferable. But before forum and procedure are debated, more basic facts must be considered.

By the first article of the General Pact for the Renunciation of War,

[32] Cf. note 12, *supra*. Also *Foreign Relations of the United States, 1919. The Paris Peace Conference* (Washington: Government Printing Office, 1942), Vol. 1, pp. 341, 354 (Allied policies and proposals); Vol. 2, pp. 71–75 (German peace proposals).

[33] Sheldon Glueck, *op. cit.*, p. 146.

[34] During the first World War, this question was considered by Hugh H. L. Bellot in a section of his pioneer study on "War Crimes: Their Prevention and Punishment," *Transactions, Grotius Society*, Vol. 2 (1917), at pp. 34 ff. After the war, it was again reviewed by Lord Cave, in "War Crimes and Their Punishment," *ibid.*, Vol. 8 (1923), at p. xxx.

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proclaimed in force on July 24, 1929, by President Hoover, the High Contracting Parties renounced war "as an instrument of national policy in their relations with one another." At present, most of the United Nations themselves are at war with seven of the signatories of the Briand-Kellogg Pact. Most of the members of the United Nations responded to the unprovoked attacks by their present enemies with declarations of war. But at least one member declared war formally only after fighting the enemy for several years, and yet another and most important member of the United Nations, to the best of our knowledge, has not formally declared war at the time of this writing.[35] But if the Pact of Paris "out-

[35] China has been fighting Japanese armies ever since the fateful evening of July 7, 1937, when Japanese troops began holding illegal maneuvers at Lioukouchiao, a railway junction of strategic importance near Peiping, where their presence could not be defended under any existing treaty or agreement; indeed, actual hostilities were in progress at all times between China and Japan, in one area or another, ever since the outbreak of the "first Sino-Japanese controversy" in 1931. On December 12, 1941, the Chinese Government in Chungking released to the press the texts of its two declarations of war (one against Germany and Italy jointly, effective as of December 9, 1941, and the other against Japan). Reprinted in *Amer. Jour. of Internat. Law*, Vol. 37 (1943), Supplement, pp. 1–2.

The Government of the U.S.S.R. took note of Hitler's proclamation of June 22, 1941, and of von Ribbentrop's statement which was issued simultaneously and was "supposed to constitute a declaration of war." But Commissar Molotov's statement in reply to that of von Ribbentrop confined itself to noting Germany's aggression. Indeed, the Russian statement, by avoiding a declaration of war, built up a much better case: Russia was fighting in self-defense, and to uphold the sanctity of the provisions of the Pact of Paris. A declaration of war, with debatable usefulness for municipal purposes in a total war, would only detract from this position. For the events of the summer of 1941, cf. *New York Times*, June 23, 1941, pp. 4, 6, and 10; and *ibid.*, p. 5, for the Italian declaration of war on Russia. An examination of the Chronicle of International Events in the recent issues of the *American Journal of International Law*, as well as of the daily press and the *Information Bulletin* issued by the Embassy of the U.S.S.R. in Washington, D.C., did not reveal a formal declaration of war by the Government of the U.S.S.R. against Germany and Italy up to the present time. Cf. also note 37, *infra*.

For the arguments which follow, it might be of value to ask at this point: Is there a clear test case where, *e.g.*, a state first joined the United Nations in opposing the aggression of the Axis and the violation of the Pact of Paris, and only later issued a formal declaration of war (which, at that later date, was to all intents and purposes primarily of municipal legal importance)? One of the most recent cases in point is that of Ethiopia. On October 9, 1942, an exchange of messages between Emperor Haile Selassie and President Roosevelt was announced by which Ethiopia joined the United Nations. *New York Times*, Oct. 10, 1942, p. 4. It was not until December 1, 1942, however, that Ethiopia proclaimed [sic!] a state of war with Italy, Germany, and Japan. *Department of State Bulletin*, Dec. 19, 1942, p. 1009. Cf. the policy of Iran, which became a virtual ally of the United Nations after the Anglo-Russian invasion of August, 1941, and more particularly by the signature of the military pact with Great Britain and the U.S.S.R. on January 30, 1942 (*New York Times*, Jan. 31, 1942, p. 7). The Iranian Government did not declare war on Germany until Sept. 9, 1943 (*ibid.*, Sept. 10, 1943, p. 3).

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lawed" war, can declarations of war be of any significance, nay, can they have any validity under international law? For the case of unprovoked aggression, John Bassett Moore made the following statement in a letter to Samuel O. Levinson, while discussions of the Pact of Paris were in progress: "Do not attempt to distinguish between aggressive wars and defensive wars. The right of self-defense is inherent. It is not war. Self-defense by a nation is not war. *When once you have outlawed war, do not use the word war any more.*"[36]

In commenting later upon Judge Moore's statement, Professor Quincy Wright wrote: " . . . It seems very doubtful, therefore, whether a state would under the Pact declare war as an act of self-defense unless another state was already in a state of war against it, in which case the other state would already have violated the Pact."[37]

It is submitted, then, that the declaration of war is a municipal legislative measure, designed to inform both friend and foe of the new international status of the declaring state;[38] but the principal effect of the declaration is municipal.[39] This accords with the doctrine that interna-

[36] Quoted by Quincy Wright, in "The Meaning of the Pact of Paris," *Amer. Jour. of Internat. Law*, Vol. 27 (1933), at p. 51. Italics supplied.

[37] *Ibid.* Cf. William E. Rappard, *The Quest for Peace* (Cambridge, Mass., 1940), pp. 171–172.

[38] 7 Moore, *Digest*, pp. 153–154; Quincy Wright, "When Does War Exist?," *Amer. Jour. of Internat. Law*, Vol. 26 (1932), at p. 363; and Herbert W. Briggs, *The Law of Nations* (New York, 1938), p. 720, quoting a report of the Secretary-General of the League of Nations in 1927. A state of war implies the jural equality of the belligerents, as expressed in their equal right to prosecute hostilities and to benefit from the observance of neutrality on the part of third states. This jural equality, however, is incompatible with the concept of aggression.

A declaration of war is thus concerned with legal status, not with a condition. The concepts of a declaration of war and the existence of hostilities apparently have never been synonymous. The hostilities incident to a police action (advisedly we refrain from using the term "reprisals" or the like) under the Briand-Kellogg Pact can be conducted without a declaration of war. Cf. also the provisions of the (Argentine) Anti-War Treaty of Non-Aggression and Conciliation, signed at Rio de Janeiro, October 10, 1933, and the (unofficial) Budapest Articles of Interpretation of the Pact of Paris, adopted by the International Law Association in 1934. *U.S. Treaty Series*, No. 906, and 38 *International Law Association* (1934), pp. 1–70, respectively.

[39] *E.g.* the belligerent's municipal rights of restraint, seizure, and destruction of property of the national subjects; prohibition of trade with the enemy; issuance of special licenses to trade with the enemy, of passports and safe-conducts; grant of licenses to cartel ships; permission or prohibition of ransom; prohibition of export of articles subservient to warlike uses; and so forth. Douglas Owen, *Declaration of War* (London, 1889), pp. 254–310; A. Mérignhac, *De la Déclaration de Guerre* (Paris, 1907), pp. 299–369, *passim;* Alhard von Burgsdorff, *Die Kriegserklärung und ihre Wirkungen* (Düsseldorf, 1914), Dissert., pp. 29–70, especially pp. 44 ff. Article 9 of the Harvard Draft on Rights and Duties of States in Case of Aggression: "A State assumes the status of a co-defending State by giving notice of that fact to all other States." And the comment: " . . . Since other States may have to regulate

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tional law operates upon individuals within a state because, and whenever, it is *enforced* through municipal legislation.[40] The principles of international law are changing constantly in our "shrinking world." For the enforcement of every new tenet arrived at in the development of international law, new or different municipal measures may be required

their conduct to conform to the status of State A as a co-defending State, it seems obviously desirable that State A be required to give notice." *Amer. Jour. of Internat. Law*, Vol. 33 (1939), Supplement, p. 901; to the same effect, Article 11, *ibid.*, p. 902, for supporting States.

Cf. also Robert M. W. Kempner, "The Alien Problem in the Present War," *Amer. Jour. of Internat. Law*, Vol. 34 (1940), p. 443; William W. Fitzhugh, Jr., and Charles Cheney Hyde, "The Drafting of Neutral Aliens by the United States," *ibid.*, Vol. 36 (1942), p. 369.

[40] Q. Wright, "The Enforcement of International Law through Municipal Law in the United States," *University of Illinois Studies in the Social Sciences*, Vol. 5, No. 1 (Mar., 1916). Cf. L. Oppenheim, *op. cit.*, pp. 236–237. The Hague Conventions of 1899 and 1907 laid down rules of international law, but the effectiveness of these rules lies in the fact that states govern the actions of their agents by municipal regulations so as to comply with the standard established by international law. If the standard has changed in some respect, the municipal legal provisions which were formerly required to enforce it may have become obsolete for the purposes of international law. Thus, the Briand-Kellogg Pact (to be made effective) must render obsolete the provision of Article 1 of Hague Convention III of 1907. This does not mean, however, that any of the humanitarian rules of the Hague Conventions still representing standards of international law (together with earlier and later conventions) have likewise been rendered obsolete by the Pact of Paris; they refer to the conduct of *hostilities*, not a legal state of war, and therefore are standards just as well in a police action under the Briand-Kellogg Pact as in a formally declared full-fledged war of another day. Article 7 of the Budapest Articles of Interpretation, cited. Also Harvard Draft Convention on Rights and Duties of States in Case of Aggression, Article 14 and comment, *op. cit.*, p. 905, and L. Oppenheim, *op. cit.*, pp. 174–175.

It has been suggested that in the present conflict punishment be meted out only to the aggressors' soldiers who violate the rules mitigating the severity of warfare, not to those of the United Nations. Advocates of this idea point out that the authorized agents of a political community have the right to suppress the law-breaker (here of the Pact of Paris) by all available means. This argument may prove difficult to support. Article 14 of the Harvard Draft Convention on Aggression provides that "nothing in this Convention shall be deemed to excuse any State for a violation of the humanitarian rules concerning the conduct of hostilities prescribed by international law or by a treaty to which it is a party." The use of the words "any State" is in consonance with other provisions of the Convention, *e.g.* that of Article 3 (1): "*Subject to Article 14*, an aggressor does not have any of the rights which it would have if it were a belligerent. . . . " *Op. cit.*, p. 886. Italics supplied. The responsible officials of the aggressor states are to be held responsible for violating the Pact of Paris. But if, besides this, the aggressors' soldiers alone are punished for violations of the humanitarian rules concerning the conduct of hostilities, it might in fact imply a vicarious punishment of these individuals for the (different) crime(s) of their rulers and leaders. That the latter, if they have acted both as civilian officials and military leaders, may be guilty of both kinds of violations (Pact

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for putting it into effect. The declaration of war is a relic from the time when the concept of war in international law still had to be municipally enforced. Today, such a declaration is obsolete, from the standpoint of international law. Today, international law has progressed to the outlawry of war, and the municipal legislative measures needed effectively to enforce this new tenet are the provisions for punishing offenses in pursuance of violations of the Pact of Paris.[41] That the declaration of war persists in municipal law is quite understandable; for it has definite functions to fulfill in that province if considered necessary by the declaring Government. Its function as a means of enforcing tenets of international law has, however, been superseded by new municipal legislative measures appropriate for the enforcement of the Briand-Kellogg Pact. If the declaration of war is considered to have had both an international and national function in the past, and now has only a national function, it may be revoked as soon as the emergency for which it was enacted has passed, much in the same manner as one municipal statute may supersede another which is no longer needed.

Since war has been outlawed, the present conflict must be taken to be a police action (of gigantic proportions to equal the stature of the criminals) to suppress aggression.[42] The desirable sequence to such a police

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of Paris, and rules mitigating the severity of warfare) should not obscure the principal distinction.

Concerning wars which have been fought previously without declarations of war and/or without being followed by a treaty of peace, cf. J. F. Maurice, *Hostilities without Declaration of War, 1700–1870* (London: His Majesty's Stationery Office, 1883); Alhard von Burgsdorff, *op. cit.*, Appendix I; Quincy Wright, *A Study of War* (Chicago, 1942), Vol. 1, p. 638, and the tables contained in Appendix XX.

[41] ". . . On pourrait dire [wrote Judge Caloyanni in 1931], sans être accusé d'aller trop loin, que le Pacte de Paris est un embryon d'un droit constitutionnel international, car, en défendant le recours à la guerre, il domine le droit de déclaration de guerre inscrit dans les diverses Constitutions." Megalos A. Caloyanni, "L'organisation de la Cour Permanente de Justice et son avenir," 38 *Recueil des Cours* (1931, IV), p. 655, at p. 734.

The immediate repercussions of the conclusion of the Briand-Kellogg Pact upon several municipal law systems were pointed out as early as 1930 by the oustanding jurist who drafted both the new Roumanian penal code and one of the first plans for the establishment of a regular international penal court. Vespasian V. Pella, in "La répression des crimes contre la personnalité de l'État," 33 *Recueil des Cours* (1930, III), at pp. 805 ff.

[42] "We have been forced to call out the sheriff's posse to break up the gang in order that gangsterism may be eliminated in the community of nations." President Roosevelt at Ottawa, Ont., on August 25, 1943 (*Department of State Bulletin*, Aug. 28, 1943, Vol. 9, pp. 122–123; *New York Times*, Aug. 26, 1943, p. 2). See also the remarks of Lord Howard of Penrith in the House of Lords, on February 20, 1935, 95 *H.L.Deb.*, 5 s., cc. 1018–1019. Lord Howard, while British ambassador to the United States, participated in the negotiations for the Pact of Paris.

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action is trial of the individuals guilty of criminal participation in the aggression. The bill of attainder procedure proposed by Mr. Warren at the meeting of the American Society of International Law, on May 1, 1943, would also form a logical sequence to the violation of the Pact of Paris; yet in a choice between acts of high policy (in effect) and actual trials for violations of a criminal law, the latter would seem to be more conducive to the further development of international law in the direction of a "real law" for the community of nations.

Treaties of peace belong to the era when wars were still legal. There appears to be little use for one at the end of a police action. For the police action was designed, among other things, to arrest (and bring to trial or otherwise dispose of) the violators of the law abolishing war. And as Under Secretary of State Welles said in the statement quoted earlier in this paper, the United Nations are anxious to avoid any use of vicarious responsibility in dealing with the peoples with whom we are presently engaged in hostilities. *Impossibile est quod universitas delinquat!* As soon as the aggression has been suppressed and the criminals have been arrested, a condition of peace and order has been legally restored. (Actually, much re-education and re-building in every respect may be necessary in many countries occupied or devastated by the Axis Powers. But upon the end of the police action, when hostilities cease, peace and order have *eis ipsis* been restored.) A treaty of peace would merely destroy the concept of the police action, so necessary to make the Pact of Paris work.[43]

[43] The incidental advantages for postwar reconstruction to be derived from preserving the idea of the police action and abstaining from the conclusion of a treaty of peace are many: for instance, there will be no "carving up" and redistribution of territories by the victors at a peace conference. Rather, at the end of the police action all territories and property titles return to the *status quo ante crimen (bellum) commissum*. Cf. the principle of precariousness in occupation as developed by Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington, 1942). This is to demonstrate that nothing in international relations shall be gained by sheer force without right. Harvard Draft Convention on Aggression, Article 4, *op. cit.*, pp. 888–896. Cf. H. Lauterpacht on the maxim *ex injuria jus non oritur*, in *Legal Problems in the Far Eastern Conflict* (New York, 1941), pp. 140 ff. But promptly after the criminals have been brought before the international tribunal with which we shall deal in the following pages, and as soon as a law-abiding government of the enemy can be recognized (and we can do no more here than point out that the handling of the tool of recognition by the United Nations ought to be in accord with over-all postwar policy), a conference can be held where equals may thrash out their difficulties. (This would be a conference among equals, and not a peace conference which the defeated enemy might regard as a continuation of military contest by diplomatic means.) To vindicate the reputation of the police action and the principle that grievances should not (because they need not) be resolved by force, this conference must produce results! It would require then at that time a maximum of good-will on all sides for reaching a reasonable (compromise) agreement. It will be an honorable task for propaganda and education everywhere to

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Before war was outlawed, and before its paraphernalia became obsolete as legal characteristics, the end of hostilities was brought about by an armistice; the treaty of peace followed after a peace conference had sat when the contest of arms had ceased. Like the treaty of peace, the armistice is now an obsolete matter. The success of the police action cannot be a truce, but an unconditional surrender of the criminals in order to bring the latter to trial (avoiding the extension of vicarious responsibility). The joint declaration by the President of the United States and the Prime Minister of Great Britain, issued upon their epoch-making meeting at Casablanca, the "white house of North Africa," on January 25, 1943, thus gains added importance.

If we state that the concept of an armistice has been superseded by that of unconditional surrender, as war has been superseded by the international police action in support of the Briand-Kellogg Pact, we give added support to the idea of holding trials at the conclusion of hostilities.[44] But we rephrase our earlier statement and assert that the time to hold war crime trials is (as soon as possible) after the unconditional surrender of the enemy government (not after the armistice). We do not oppose war crime trials held after the conclusion of a treaty of peace because this has been (more or less directly) the element which caused the dismal failure of the war crime trials after the last (legally speaking) World War, but rather because now there may not be any peace treaty at all after which to hold trials.

The projected "war crime trials" before an international tribunal, after the unconditional surrender of the enemies of world order, will then be concerned in the main with two distinct classes of crimes: one, the employment of war as an instrument of national policy; the other, such violations of the laws of war (in pursuance of this illegal policy) as the United Nations agree to try before an international tribunal.[45] Both classes consist of "international law crimes." And lest the argument *nulla poena sine lege* be opposed to the idea of "war crime trials" before an international court, let us be reminded that a community has inherently the right to punish its members who seek to destroy it. International law exists within states because it is municipally enforced by all who abide by it. And none will deny that effective criminal sanctions exist in all civilized countries today.[46] It is, therefore, to the constitution of the international tribunal and to its procedure that the remainder of this study is devoted.

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gain the support of an enlightened public opinion for such a settlement in the interest of peace. The burden of this task will be somewhat lightened from the outset by the absence of a (prior) peace treaty or *Diktat;* on this, propaganda should capitalize. Cf. W. B. Pillsbury, "Propaganda and the Democratic State," *Scientific Monthly* (June, 1943), p. 549.

[44] Cf. note 12, *supra.*

[45] Cf. note 40, *supra*, concerning the violations of the laws of war.

[46] A forerunner of the Pact of Paris and of municipal provisions for enforcing its

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III. THE MOVEMENT FOR AN INTERNATIONAL CRIMINAL COURT

The movement for an effective and permanent criminal procedure in international relations is generally dated from the plan to establish the High Tribunal for war crimes at the end of the last World War,[47] and more specifically from the proposal which Senator Baron Descamps, of Belgium, later made to the Advisory Committee of Jurists at The Hague in 1920, in his capacity of chairman, to establish a High Court of International Justice competent to try "offenses against international public order and the universal law of nations."[48]

The movement which received its impetus from the Descamps proposal, and, incidentally, was not deterred by the cold reception which the latter found at the hands of contemporary statesmen, became a twofold one: one wing favored establishment of an international criminal law through the unification of national penal codes; the other desired first of all to see an International Criminal Court established which would apply national codes until provided with an international criminal code proper. Many adherents of the first wing realized, however, that courts in different countries might apply even perfectly unified codes so differently that

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rules may be found in Senator Borah's resolution of February 13, 1923. S. Res. 441, 67th Cong., 4th s. Comp. S. Res. 45, 70th Cong., 1st s., Dec. 12, 1923. As it was then apparent that "war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and be strictly within its legal rights . . . ," the resolution proposed that " . . . Every nation should be encouraged by solemn agreement or treaty to bind itself to indict and punish its own international war breeders or instigators and war profiteers under powers similar to those conferred upon Congress under Article I, Section 8, of our Federal Constitution which clothes the Congress with the power to define and punish offenses against the law of nations." The Borah resolution thus called for "the development of the standard of state responsibility under international law for acts injurious to other states taking place under its authority or in its territory." Quincy Wright, "The Outlawry of War," *op. cit.*, at p. 80. Today we tend to prefer the direct responsibility of individuals under international law as a more effective method. We have also become more cautious in ferreting out the "international war breeders or instigators and war profiteers." Jacob Viner, "Political Aspects of International Finance," *Jour. of Business*, Apr., July, 1928; *Southw. Polit. and Soc. Sci. Quar.*, Mar., 1929; Eugene Staley, *War and the Private Investor* (New York, 1935).

[47] Cf. pp. 6–7, *supra.*

[48] Among the most recent surveys of the history of international criminal jurisdiction are the following: Antoine Sottile, "Le terrorisme international," 65 *Recueil des Cours* (1938, III), p. 91, at pp. 139 ff.; M. O. Hudson, "The Proposed International Criminal Court," *Amer. Jour. of Internat. Law*, Vol. 32 (1938), pp. 549 ff.; Philip M. Brown, "International Criminal Justice," *ibid.*, Vol. 35 (1941), p. 118, at pp. 119 ff. Judge Hudson also devotes a chapter to the International Criminal Court in his study of *The Permanent Court of International Justice, 1920–1942* (New York, 1943).

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ultimately, for a number of cases to be defined, only an International Criminal Court could provide an effective international forum. The latter could deal also, *inter alia*, with the troublesome problem of "political offenses." Thus both wings of the movement reached a working compromise by which one continued to favor unification of criminal codes more than the other, but both supported the establishment of an International Criminal Court.[49]

The jurisdiction of the proposed International Criminal Court in the Bellot Draft of the International Law Association (1926) was projected to extend to all charges of

"(a) Violations of international obligations of a penal character committed by the subjects or citizens of one State or by a heimatlos against another State or its subjects or citizens.

(b) Violations of any treaty, convention, or declaration binding on the States parties to the Convention of (*place*) dated day of ————, 192–, which regulates the methods and conduct of warfare.

(c) Violations of the laws and customs of war generally accepted as binding by civilized nations.

Without prejudice to the original jurisdiction of the Court as hereinbefore defined, the Court shall have power to deal with cases of a penal character referred to it by the Council or Assembly of the League of Nations for trial, or for inquiry and report.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."[50]

Aside from the plan to provide international penal sanctions for the observance of international obligations in general and the laws and customs of war in particular, the proposed tribunal was to constitute an efficient device for maintaining international peace in the hands of the League Council and Assembly. But the League system, and the court(s) connected therewith, were designed to deal with states as entities, not with individuals (physical persons).[51] Indeed, a number of jurists recommended the establishment of a Criminal Chamber in the extant Permanent Court of International Justice in lieu of the creation of a wholly new tribunal.[52] Likewise, it was pointed out by some that the new tribunal, if established, should have two kinds of jurisdiction: over states,

[49] These and the following arguments are so briefly summarized that they can in no way do justice to the many learned discussions published on special aspects of the question. A more detailed study should take into careful consideration at least the material indicated in the bibliography accompanying Sottile's article, *op. cit.*

[50] *International Law Association*, Vol. 34 (1926), p. 118, Art. 21 as amended at the Vienna Conference.

[51] William E. Rappard, *op. cit.*, pp. 137–156, *passim.*

[52] According to Judge Caloyanni, one of the first suggestions to this effect was made by M. La Fontaine early in the twenties: "An International Criminal Court," *Transactions, Grotius Society*, Vol. 14 (1928), pp. 69–70.

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to punish instances of international aggression with the imposition of fines and compulsory levies for reparations; and, secondly, over individuals, for the repression of political crimes along with others defined, or to be defined, in special international instruments.[53]

This caused a remarkable confusion of principles and ideas. The origin of the view must be sought in the "unification wing" of the International Criminal Court movement. Jurists in this group were determined to oppose the trial of their nationals before any "foreign" tribunals (and they regarded international tribunals as "foreign") except for certain (comparatively minor) offenses in regard to which they hesitatingly yielded ground.[54] But under no circumstances would they permit that any of their nationals might be tried for urging and causing an international incident such as an international aggression. Their colleagues of the other "wing" called for a tribunal with sufficient jurisdiction to aid in the quest for lasting peace, and not only to function in matters fairly well taken care of by extradition arrangements.[55] The unification wing answered this challenge by showing that all municipal penal codes could levy penal sanctions on acts designed to cause international complications and perpetrated or actionable within the jurisdiction of the state concerned; in fact, advocates of the "unification wing" caused their Governments to adopt such provisions in their municipal penal codes.[56] These jurists also conceded that the International Criminal Court should be employed in the quest for peace. Yet, utilizing the doctrinal basis of the League system, and still much attached to their own preferences, the unification advocates assidu-

[53] Vespasien V. Pella, *La Criminalité Collective des États et le Droit Pénal de l'Avenir* (Bucharest, Imprimerie de l'État, 1926), 2nd ed., and the authorities reviewed by Jean Reliquet, in *De l'Utilité et de l'Organisation d'une Jurisdiction Criminelle Internationale* (Rennes, 1928), thèse. Also Quintiliano Saldaña, "La Justice Pénale Internationale," 10 *Recueil des Cours* (1925, V), pp. 225–429, *passim.*

[54] Thus the exchange of question and answer between Chairman Caloyanni and Sir Graham Brewer at the Vienna meeting of the I.L.A. in 1926. *International Law Association*, Vol. 34 (1926), p. 154. Similarly, Emeric Vadasz in his critique of the Vienna proceedings, "Jurisdiction Criminelle Internationale," *Rev. Droit Int. et de Sc. Dipl.*, Vol. 5 (1927), at p. 278.

[55] The limitations of the unification idea as such can be seen in the Official League Document on the "Gradual Unification of Criminal Law and Coöperation of States in the Prevention and Suppression of Crime," of May 30, 1933. *L. of N.*, Office. No. A.7.1933 V.

[56] Cf. the examples cited by Pella, "La Répression des Crimes, etc.," *op. cit.*, pp. 806–809; notes 1 and 2, p. 809. Article 229 of the Roumanian penal code project of July, 1928, *e.g.*, provided: "Seront punis de la détention simple de deux mois à un an tous ceux qui, dans le but de forcer l'État roumain à déclarer une guerre d'aggression, inciteront l'opinion publique à une pareille querre par une propagande faite à l'aide des moyens indiqués á l'article 138 [press, etc.]. . . . " Cf. Art. 508 of the Brazilian penal code project (V. de Sa Pereira) and 107 of the Polish penal code project of November, 1929.

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ously cultivated the doctrine that states as such could commit crimes, and that, for incidents of aggression, the International Criminal Court could only punish states.[57] *Bartolus redivivus!*

The confusion was laid bare by the Pact of Paris. The League Covenant had not outlawed war, the Briand-Kellogg Pact did so.[58] The League Covenant dealt mainly with states (which to the criminal lawyer, since Laschi, Lombroso, and Sighele, would represent "forces" or "masses"),[59] the Pact of Paris candidly specified the use of war as "an instrument of national policy." If war was to be outlawed, the peoples (in whose number the real culprits would hide and be punished together with the innocent) should not be held responsible, but the policy-makers who used war as an instrument, as a tool or an aim.[60] The Pact of Paris finally provided the *lex;* a tribunal with international criminal jurisdiction was needed to adjudge the *poena.*

It is not intended here to take issue in any derogatory manner with the very great number of useful functions which the League system as a whole could and can fulfill in the realm of international organization. But likewise, it may not be amiss to point out that only the Briand-Kellogg Pact could give real meaning to the plan for an International Criminal Court—for one reason, because a sanction ought to be provided for the crime defined by the Pact. And secondly, since international police actions

[57] As late as 1929, Professor Levitt's draft of an international criminal code made such provision (Arts. 2 and 6). Albert Levitt, "A Proposed Code of International Criminal Law," *Rev. Int. de Droit Pénal,* Vol. 6 (1929), pp. 18–32. Cf., however, Art. 7, p. 26.

[58] This is not meant to imply that the League Council and Assembly never condemned wars of aggression. Cf. the "Declaration Concerning Wars of Aggression," Sept. 23, 1927, *L. of N.*, Official Document No. A.109.1927.IX. S. Engel, "League Reform; An Analysis of Official Proposals and Discussions, 1936–1939," *Geneva Studies* (Geneva Research Center), Vol. 11, Nos. 3–4 (Aug., 1940).

[59] Article 16 of the League Covenant appears to contain a contradiction. It provides: "1. Should any Member of the League *resort to war* in disregard of its covenants under Articles 12, 13, or 15, it shall ipso facto be deemed to have committed an *act of war* against all other Members of the League, *which hereby undertake to subject it to the severance of all trade or financial relations, . . . and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State,* whether a Member of the League or not." (Italics supplied.) The second paragraph of the Article cited makes provision for possible military measures. But if an act of aggression is styled a "resort to war" and considered to initiate a "state of war," giving the aggressor full legal status as a belligerent with rights equal to those possessed by the state attacked, the economic and military sanctions to which League members are obligated in such cases can have no foundation in law as a police action. The amendment to Article 16 (1), now awaiting ratification, does not remedy the flaw.

[60] The term "instrument," as used in the Pact, should be interpreted as meaning "utensil," "implement," employed by natural persons. Cf. Caes. *B.G.* 6, 30; Just. 38, 10, 4; Ov. *M.* 3, 698.

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might still be necessary (a fact to which we are witnesses today), and the customary and conventional rules for mitigating the severity of hostilities would still remain in force,[61] the latter could now be enforced also by an international tribunal for the relatively smaller number of violations not easily disposed of by the municipal or military courts of one single state in the event of such an international action.

After the general adoption of the Pact of Paris, the International Criminal Court movement evidently drifted more and more in the direction of making only individuals subject to the jurisdiction of the proposed tribunal. The arm of justice began to reach even for the pinnacle of the sovereignty of national states, and would hold policy-makers and rulers responsible for the actions of their governments in the light of the solemn international obligations of the state in whose name they purported to act.[62] Some advocates of the International Criminal Court, at least, began

[61] Cf. note 40, *supra*. The aggressor, however, does not have any of the rights which it would have as a lawful belligerent (conscription of property, etc.). Harvard Draft Convention on Aggression, cited, Arts. 2–4 incl.

[62] The "High Contracting Parties" of the General Pact for the Renunciation of War are: "THE PRESIDENT OF THE GERMAN REICH, THE PRESIDENT OF THE UNITED STATES OF AMERICA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF JAPAN, THE PRESIDENT OF THE REPUBLIC OF POLAND, THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC. . . ."

These parties, in the first Article of the Pact, ". . . solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." Text of Pact as reprinted in *International Conciliation*, Oct., 1928 (No. 243), pp. 521–523.

If these sovereigns (and the governments of their states), in a manner binding upon themselves and their successors, "declare in the name of their respective peoples" that resort to war shall henceforth be unlawful, it may be construed that these rulers and officials cease to represent (and speak in the name of) their peoples if they do resort to (an aggressive) war, now that the Pact is in force. The same applies to the later adhering parties of the Pact. Rulers and governments who employ war as an instrument of national policy despite solemn promises to the contrary thus become "outlaws" under international law. These "outlaws" may be accused of an act of high treason committed on the international community. (The only party to the Pact which can automatically become an international outlaw is the Japanese Government, due to the reservation it made when signing the agreement: the Japanese Emperor became a party to the Pact in his own right; he did not act "in the name of his people.") Professor Glueck writes, not referring to the Pact alone: "The doctrine that a "chief of state" is immune from trial and punishment no matter how heinous and numerous his crimes requires serious re-examination. A sound argument can be made to the effect that it is a doctrine of municipal law and does not necessarily apply to international law nor to the jurisdiction of the proposed International Criminal Court." *Op. cit.*, p. 145.

The feasibility of the initial suggestion of Professor Glueck may be proved more

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to press for a status of the individual as subject of the law of nations, thereby supplementing or replacing the extant Permanent Court of International Justice with a forum to which individuals would have access directly.[63] If individuals were to be criminally liable for certain acts, these jurists reasoned, how could they be kept from the bar of justice to demand in their own right justice in international matters?

After the assassination of King Alexander of Yugoslavia and the French Minister for Foreign Affairs, M. Louis Barthou, in Marseilles on October 9, 1934, it was M. Pierre Laval who moved that the League of Nations sponsor a diplomatic conference to deal with the international problem of terroristic crimes.[64] Upon careful preparation, a Convention for the Prevention and Punishment of Terrorism was opened for signature at Geneva on November 16, 1937, together with a Convention for the

readily than he appears to be aware. In municipal law, cf. the trial of Mary Queen of Scots under 27 Eliz.c.1 (1585), and of Charles Stuart (Jan. 3–4, 1649), 4 Howell, *State Trials*, pp. 989 ff. In modern times, the penal responsibility of a chief of state was recognized, *e.g.*, by Article 68 of the French Constitution of 1848 (making dissolution of the National Assembly by the President of the Republic high treason). In international relations, precedents can likewise be found as early as the tenth, eleventh, and twelfth centuries, *e.g.*, the trial of Henry the Lion, and the case of John Lackland, whose criminal trial scholars have much neglected as compared with the feudal trial. Cf. Heinrich Mitteis, "Politische Prozesse des früheren Mittelalters in Deutschland und Frankreich," *Sitzungsber., Heidelb. Akad. d. Wissensch.*, Philosophisch-hist. Klasse (1926–1927), 3. Abhandlung, pp. 48 ff., and pp. 88 ff.

[63] In 1924, Philip Marshall Brown called for "a thorough reappraisal and revision of the principles of the law of nations in order to regulate properly all the complicated relationships in international society and to facilitate justice within the family of nations. . . ." "The Individual and International Law," *Amer. Jour. of Internat. Law*, Vol. 18 (1924), at p. 534. Wrote Professor Jitta early in 1925: " . . . C'est en somme le genre humain qui est la base de tous les devoirs at de tous les droits internationaux. Cette thèse, que j'ai cru devoir adopter est loin d'être généralement admise. Abstraction faite de ma santé chancelante, je ne m'attends à le voir prédominer de mon temps, mais, pour l'avenir, je ne désespère pas." "Nation et Individu," *Grotius*, Annuaire international pour l'année 1925 (The Hague, 1925), at p. 84. Cf. also Nicholas Politis, *The New Aspects of International Law* (Washington, 1928), pp. 20 ff.; Jean Spiropoulos, "L'individu et le droit international," 30 *Recueil des Cours* (1929, V), p. 195; Edvard I. Hambro, "Individuals before International Tribunals," *Proceedings, Am. Soc. Int. Law*, Vol. 35 (1941), p. 22; Hans Aufricht, "Personality in International Law," in this REVIEW, Vol. 37 (1943), p. 217. The idea of giving individuals direct access to international courts appears to have taken concrete form for the first time in the Convention for the Establishment of a Central American Court of Justice (Art. 2). Reprinted in *Amer. Jour. of Internat. Law*, Vol. 2 (1908), pp. 231 ff.

[64] For details, cf. Antoine Sottile, *op. cit.*, pp. 142 ff.; Arthur K. Kuhn, "The Assassination of King Alexander," *Amer. Jour. of Internat. Law*, Vol. 29 (1935), p. 87; Michel Liais, "L'affaire hungaro-yugoslave devant le Conseil de la Société des Nations," *Rev. Gen. de Droit Internat. P.*, Vol. 42 (1935), p. 127.

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Creation of an International Criminal Court.[65] By the end of 1942, the representatives of thirteen states had signed the latter convention, but none had found it possible to ratify the instrument.[66] The tribunal proposed in the Convention(s) of 1937 could not exist independently of the Convention on Terrorism, and could be used for no other purposes than to make it possible for states to refer certain individuals (offenders under the Convention on Terrorism) to the new court.[67] However bold even this undertaking may have appeared to commentators at the time, had not a good scheme been wasted by shackling it to one (possibly even *ad hoc*) convention to the exclusion of its utilization for any of the other purposes originally envisaged? An International Criminal Court exists on paper today, but it can deal in only a limited fashion with incidents of terrorism especially referred to it; and we still have to put teeth into the provisions of the Pact of Paris.

IV. THE ESTABLISHMENT OF A NEW INTERNATIONAL CRIMINAL COURT

In order to give clear proof of the fact that the United Nations have been fighting this global conflict to vindicate the principles of the General Pact for the Renunciation of War (as an ultimate aim beyond the immediate necessity of self-defense), a general agreement should be reached for the establishment of a new and permanent International Criminal Court as final sanction of the aforementioned Pact. A United Nations Conference should be called in the near future to begin work on this project. The valuable preliminary studies of international organizations, as well as by savants and jurists individually, should be consulted carefully in drafting the convention for the establishment of the new tribunal.

Most of the states of the civilized world are parties to, and have ratified, the Pact of Paris. Many have witnessed numerous violations of that solemn agreement, with incident suffering on a tremendous scale to their own as well as other peoples. The United Nations should therefore call on all states of the civilized world to assist in finally providing the Pact of Paris with an effective sanction. Germany, Italy, and Japan were represented among the principal signatories of the Pact, and at one time they supported the outlawry of war as an instrument of national policy. The President of the United States and the Prime Minister of Great Britain have demanded the unconditional surrender of the criminal cliques which have arrogated the powers of government in these three countries. But the

[65] *L. of N.*, Official Documents Nos. C.547.M.383.1937.V and C.547.M.384.-1937.V.

[66] Manley O. Hudson, *The Permanent Court of International Justice, 1920–1942*, pp. 86–87.

[67] Cf. *L. of N.* Document No. C.547.M.384.1937.V., Art. 1.

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United Nations should declare their readiness to welcome back Germany, Italy, and Japan into the ranks of the civilized nations of the world from whose midst they were torn by their criminal leaders.

As a condition for such reëstablishment of normal peaceful relations with the United Nations, however, new governments lawfully constituted in Germany, Italy, and Japan (and such Axis satellites as may not have returned to the fold of the civilized nations before that time) should first adhere to the proposed convention for the establishment of an International Criminal Court as a token of their intention to abide henceforth by the Pact of Paris. By such adherence, peace should be fully restored. No burdensome treaty of peace should be imposed on peoples for the crimes of their leaders and their accomplices.

Principals and accessories of the violations of the Pact of Paris should be tried in any event at the end of hostilities before the new International Criminal Court. This tribunal, in applying and implementing the provisions of the Briand-Kellogg Pact (recognized also by Germany, Italy, and Japan as valid standards of international law), cannot be accused of applying an *ex post facto* law. That no implementation of the Pact of Paris was devised at an earlier date cannot constitute a bar to the proposed prosecutions, and can assuredly not be used as a defense for breaking the extant law.

The United Nations should also utilize the procedure of the proposed new International Criminal Court to prosecute such violators of the laws and customs of war in the present conflict as they agree to try before an international tribunal. If wanton and deliberate violations of the most basic laws of humanity by a criminal ruler or government within the territory under his/its domain is made subject to the jurisdiction of the new tribunal in the convention establishing the same (because such violations of the international common law are a potential cause of international strife), the United Nations should also cause the International Criminal Court to prosecute the many crimes committed even long before the outbreak of the present hostilities and falling within the category.

The establishment of the new International Criminal Court constitutes a singular challenge for imaginative and pioneering diplomacy. It may be viewed as a moral victory which we shall have to win (possibly even over some misgivings and incredulity of our own) before we can benefit from the victory of arms which we are striving to gain.

I cannot indicate here all of the characteristics which the proposed convention establishing the new tribunal should contain. The new International Criminal Court, however, should base its jurisdiction solely upon the principle of individual criminal responsibility; it should neither condemn entire states nor engage in acts of high policy outside of the law. Preliminarily, until furnished with a carefully defined international crimi-

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nal code,[68] the Court should employ the national penal codes of the accused for the measurement of the penalty;[69] the sentences thus imposed by the international tribunal are to be executed faithfully by the authorities of the states of the accused.[70] Failure by the authorities to provide such execution entails a (new) police action against them . . . as military expediency would demand it in any case.[71] The procedure for instituting

[68] For confirmation of the feasibility of such a code, cf. Georg Cohn, *Kriegsverhütung und Schuldfrage* (Leipzig, 1931), p. 49; Jacques Dumas, "Y a-t-il des crimes internationaux?," *Rev. de Droit Internat. et de Légis. Comp.*, Vol. 13 (1932), pp. 721 ff. With regard to the treatment of violations of the laws and customs of war at the Hague Conference of 1907, Professor Garner quotes Professor Renault as having stated shortly before his death that the draft of the règlement was "hastily passed over by the Conference, a few changes of detail being made here and there, and that the question of penal sanctions was overlooked." Garner, *op. cit.*, p. 467. This *lacuna* may then be filled by provisions of the proposed code. Cf. also Quincy Wright, *Study of War*, *op. cit.*, Vol. 2, pp. 1345–1347. In note 62, *supra*, I spoke of the crime of high treason on the community of nations. Such a crime, defined in an international criminal code, could exist along with the crime of high treason defined by national codes much as citizens of the old German Empire could be prosecuted for both *Reichs-Hochverrat* and *Landes-Hochverrat*. Cf. Karl von Grolman, *Grundsätze der Criminalrechts-Wissenschaft* (Giessen, 1825), 4th ed., par. 331.

[69] Thus the German *St.G.B.* may be utilized in coping with the bothersome penal problem of "violations of the basic laws of humanity," p. 24, *supra*. "Eine Liste der Verbrechen deren sich die Nazis nach ihrem Strafgesetzbuch schuldig machten," *Aufbau*, Dec. 25, 1942, p. 1. Care must then be exercised to avoid improper exculpations under the "escape paragraph" 51, *St.G.B.* The unbelievable latitude of recent revisions of the German penal code may likewise prove useful. Robert M. W. Kempner, "Hitler's Criminal Code," *Free World*, Vol. 1, p. 395. Cf. also Pella, *op. cit.*, pp. 707 ff., for a review of various national penal code provisions.

[70] Ernst. J. Cohn, *op. cit.*, p. 148, suggests establishment of international penal institutions in a League state (with a status similar to that of the Vatican) as ultimate goal.

[71] The "police actions" are, to all intents and purposes, full-fledged "just wars." The establishment of an international police force as such has not been considered here, since the usefulness of one general police force might at best appear doubtful. It would seem a long step from the kinds of police force which Wehberg found already enforcing special international (often regional) conventions to that mentioned by Keeton, whose police force would repress crimes of aggression. If a case of real aggression occurs, hostilities will break out in any event. But why should a standing international army (often equated to the term "police force"), possibly caught half prepared after long years of peace, be more conducive to the maintenance of world order than the legal obligation of all states to come to the rescue of the attacked, so to speak, in a just war "ordered" by the new court, or in execution of one of its decisions? A legal order must conform to the natural characteristics of those whom it purports to rule. The functions of a police force to suppress aggression seem to be better taken care of by the utilization of the "just war" idea in a world where states are to persist. Hans Wehberg, *Theory and Practice of International Policing* (London, 1935), pp. 43–55; George W. Keeton, *National Sovereignty and International Order* (London, 1935), p. 159, both New Commonwealth Institute monographs. Cf. Hermann Mannheim, *op. cit.*, Chap. 7, pp. 176 ff. Professor Mann-

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prosecutions before the new tribunal should be carefully elaborated in advance. All individuals accused before the International Criminal Court should be entitled to name their own counsel.[72] The jurisdiction of the court should (eventually) pervade all countries parties to the Pact of Paris. It must be stressed that this court is to constitute but an "implementation" of the adherence of the signatory powers to the pact of Paris. Practices of granting asylum and of limited extradition should not conflict with the effective working of the new International Criminal Court so as to produce again a condition of unredeemed chaos.

Whether the recent violators of the Pact of Paris will be tried or not will depend, I submit, upon the creation of the proposed International Criminal Court to enforce the extant law, and to no small measure upon the adherence of the United States to the convention creating the tribunal.[73] Likewise, whether violations of the basic laws of humanity (so direly clear to the oppressed and yet so baffling to the international lawyer) will be punished when hostilities cease, depends upon the establishment of the court and the scope of its jurisdiction.

As previously indicated, violations of the recognized laws and customs of war which the United Nations propose to try before an international tribunal can be tried before a joint (mixed) military court. In the realm of the jurisdiction of such a joint military court, the law has changed but little since the war of 1914–1918, and only few suggestions could be made for altering some of the procedure of such a tribunal.[74] Thus Professor

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heim, however, would support the redefinition of parts of the criminal law to exclude the requirement of *mens rea*, and thus to make collective persons also in international law criminally responsible (*ibid.*, pp. 199–200). While I fully subscribe to the utilization of the just war idea, I cannot recommend, in view of our earlier arguments, that *mens rea* be abandoned here.

[72] Corresponds to the provision in Part III, Art. 229, Treaty of Versailles.

[73] Congress has the power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. Constitution, I, 8 10. Under this provision, Congress could provide that certain offenses, over which the United States now has or could take jurisdiction, should be subject to the jurisdiction of the International Criminal Court. Sheldon Glueck, *op. cit.*, p. 145; cf. note 46, *supra*.

[74] Georg Schwarzenberger, "War Crimes and the Problem of an International Criminal Court," *Czechoslovak Yearbook of International Law, 1942*, p. 75. Manner, *op. cit.*, note 11, *supra*. Thomas R. White, "War Crimes and Their Punishment," *Yale Review*, June, 1943, Vol. 32, p. 706, at p. 718. Professor Charles Cheney Hyde reëxamined the questions involved in his paper on "Punishment of War Criminals," read before the meeting of the American Society of International Law, on May 1, 1943. Cf. also the transactions of the second conference of the Inter-American Bar Association, which opened on August 7, 1943, in Rio de Janeiro, and the report of the subcommittee studying the subject of war crimes to the American Bar Association on August 24, 1943, at its Chicago meeting, submitted by the subcommittee's chairman, Mr. Edwin D. Dickinson.

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Schwarzenberger has stated: "In the deliberations of the Commission established by the Peace Conference of 1919, and the Washington Conference, it was realized that the plea of superior orders had to be excluded, if any individual responsibility of war criminals was to be established."[75] But the *Führerprinzip* glorified by the Nazi and Fascist governments, and permeating the organization of their armies, may well cause the ghost of "superior orders" to be resuscitated in full vigor.[76] We are strengthened in this belief by the fact that the troublesome provisions of Articles 443 of the British *Manual of Military Law* and 366 of the *American Rules of Land Warfare* have been retained from the last World War and are valid at the time of this writing.[77]

In brief, one may counsel against the use of such an *ad hoc* joint military court as one may counsel against the equally effective bills of attainder procedure for dealing with the violators of the Pact of Paris;[78] both procedures would in no way contribute to the development of a permanent international criminal jurisdiction. An International Criminal Court, however, now established in the form suggested on the preceding pages, could mark a decided advance in the development of peaceful international relations:

> "A realistic view of international relations in the present age of close international contacts indicates a high degree of unreality in insisting upon the dogma that only states are subjects of international law. Eventual responsibility of the state

[75] Schwarzenberger, *op. cit.*, p. 81, n. 5.

[76] Among the commentaries on the new German military penal code, written before and after its enactment respectively, the following are elucidating: Eberhard Schmidt, *Die militärische Straftat und ihr Täter* (Berlin, 1936), and Fritz Gösser, *Der Missbrauch der Dienstgewalt* (Berlin, 1939).

[77] The most recent edition of the British *Manual* is dated 1929; the thirty-two amendments to this edition, issued to March, 1943, leave the article in question untouched. Section 366 of the American *Rules*, 1917 edition, reappears (as concerns the crucial "no trial passage") in Section 347 of the 1940 edition of the *Rules* (Field-Manual 27-10). The only support among international lawyers for these provisions was the statement in Oppenheim's *International Law*, Vol. II, par. 253. In the sixth edition (1940) of Oppenheim's work, however, Lauterpacht has undertaken to revise the argument.

[78] Bills of attainder and bills of pains and penalties, as differing from impeachments, have been used in English constitutional history generally (though not always) "on occasions of great moment and urgency," according to John Earl Russell: ". . . Two circumstances seem to be requisite to all bills of this kind:—First, That it is impossible to convict the offender by due course of law. Secondly, That his escape would be in the highest degree injurious to the State. Great indeed must be the mischief that would arise from the impunity of a criminal, to overbalance the evil of shaking the common security of the subject, disturbing the regular course of justice and affording an example of punishment inflicted on one who cannot be convicted of a crime." *An Essay on the History of the English Government and Constitution* (London, 1865), 2d ed., pp. 119–120. For instances of bills of attainder passed by Parliament, cf. *ibid.*, pp. 120–123.

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under international law is not adequate to preserve respect for that law in the modern dynamic and interdependent world. Responsibility must be established more immediately and more concretely if the supremacy of the law is to supersede the balance of power."[79]

THE UTILITY OF THE PROPOSED TRIAL AND PUNISHMENT OF ENEMY LEADERS*

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The present war has now reached the stage when definite plans are being announced for the control and punishment of the enemy nations when they shall have been defeated. There is a strong and apparently growing sentiment among the citizens and officials of the United Nations for prosecution of the "Axis criminals" and quarantine of Axis nations. Committees of eminent scholars, some of them presumably acting under instruction from their governments, are now drawing up plans for these trials. Many individuals, however, doubt whether it will prove feasible to carry out these proposals. Others reject the whole idea of retribution or reparation against a defeated nation or its leaders as unethical and destructive of the ends for which we say we are fighting.

We wish to be neither vindictive nor gullible. Hence the popularity of suggestions that we must be prepared to give food and medicine to the people of the Axis nations during the early postwar months. But there is widespread support also for the belief that we must be ready to administer German economic and political life for some years if we wish to be sure that war will not come again from the same quarter. This balancing of generosity against sternness means, as Walter Lippmann puts it, that "our apparently contradictory war aims can be reconciled."

The trial of Nazi leaders (for simplicity we shall deal only with the case of Germany) and the governing of Germany for a generation are distinct ideas.[1] The two are usually linked together, however, and can be evaluated by similar analyses. They would be interdependent in operation also, as we shall try to indicate later, in that it would be almost impossible to conduct the trials without expressing attitudes or performing acts of hostility toward the enemy nations.[2]

[79] Quincy Wright, *op. cit.*, Vol. 2, p. 915.

* The author appreciates the critical suggestions received from Professor Quincy Wright.

[1] Dorothy Thompson, for example, accepts the first and rejects the second. "Germany Must Be Salvaged," *American Mercury* (June, 1943), and *Reader's Digest* (July, 1943), pp. 51–56.

[2] The most detailed brief that I have read for setting up United Nations courts to punish the "Axis war criminals" is in an article by Dr. Sheldon Glueck, in *Free*

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The proposal to arraign Axis rulers before international tribunals gains appeal from its seeming harmony with hallowed traditions. Trial of criminals in proper courts expresses our respect for "law and order," while at the same time our humanitarian distaste for summary vengeance restrains us from systematic participation in or condoning irregular behavior. This attitude is neatly illustrated in a newspaper quotation from "a man in the street": "Let's give Mussolini a fair trial and then hang him." Uninhibited advocacy of violent tactics is too blatant hypocrisy for comfort and is too obviously inconsistent with our earnest avowals of a determination to create a peaceable and orderly world. Plans for the trials have also gained intellectual respectability by virtue of the fact that distinguished jurists are willing to devote their talents to the necessary advance preparation.

Advocates of the trial of Nazi leaders, as well as those who favor longer-run control of Germany, assert that these courses of action would be significant steps toward a democratic international society. This judgment rests upon certain assumptions, which I have tried to formulate in the following statements. Something would be done to prevent future wars if the leaders responsible for this latest and greatest war were punished. Leaders who might be tempted at some future time to precipitate another conflict would realize that failure must bring them personal suffering or death rather than a life of ease in which to write their memoirs. The German nation particularly would learn the folly of tolerating militarist rulers. Since we might not eliminate all wars, we should also establish the firm precedent that any soldiers or officials making war unduly cruel or persecuting noncombatants must answer for their conduct. Extending punishment to the lower ranks in this way would deter the petty hangers-on of a future aggressive régime. And, because it is impracticable to imprison

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World (Nov., 1942), pp. 138–146. The present article applies equally well to a more recent statement by Professor Glueck, "Punishing the War Criminals," in *New Republic*, Nov. 22, 1943, pp. 706–709. A summary of what purports to be an official American plan for the control of Germany is given in Kingsbury Smith, "Our Plan for Postwar Germany," *American Mercury* (Apr., 1943), and *Reader's Digest* (June, 1943), pp. 21–25.

The subtle interweaving of these two policies is clear in the following statements from Walter Lippmann's column of August 1, 1943: "The supreme heresy of our enemies is . . . the denial of man's personal responsibility and therefore of his human dignity." ". . . we shall not make the moral error of saying . . . : you were all the innocent victims of the tyrants whom you obeyed." "Nor shall we say to them: because you obeyed these tyrants, you and your children are . . . forever cursed." "Nor shall we say: leave it to us and we shall give you back liberty." "Nor shall we say: . . . we shall stuff freedom down your throats. . . ." "The true view is . . . that men are responsible for their acts . . . and that therefore *the adult Germans and Italians are accountable for the acts of their governments.*" He adds that we must temper this justice with mercy. (Italics in original.)

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for life all the minor agents of the present Fascist parties, we must adopt rehabilitation measures to qualify them for civil life again after their lesson has been suitably impressed upon them.

Those who hold these views believe the trials would bring the goal of international democracy nearer also by capitalizing upon wartime unity to commit the United Nations now to coöperative legal arrangements which would persist after the war. Since the advantages of order are more vivid while nations are contending with the disorder of war, it is easier to transform military alliances into new structures of collaboration than to mobilize enthusiasm for novel projects after peace has returned. Punishing Nazi leaders by fair but stern methods would also, it is said, convince the peoples of the defeated countries that a new order of international law was a reality.

Men holding all varieties of opinion on the merits of punishing the enemy, whether they accept or reject the statements in the foregoing paragraphs, concur on the urgency of planning now to check the widespread desire for vengeance against the Germans in the conquered countries. Those who oppose the trial of Axis leaders have offered fewer suggestions for handling this threatened uprising, but the advocates say that we must deal out exemplary treatment to a certain number of Germans to quiet this impulse for revenge, unless we are willing to wink at a reign of terror. They add that by informing the German people that penalties will be limited to a few leaders we would create a greater incentive to capitulate at an early date.

American newspapers have recently carried some stories about the trials of German leaders after the last war. The more graphic account written by Professor Glueck shows that the list of "crimes" then was similar to that which will be adduced this time. He describes the diplomatic and political obstacles that delayed the trials and limited the number of convictions, and on the basis of these events he suggests some lessons for those who are preparing for the trials after the present war. One nevertheless regrets Professor Glueck's failure to evaluate the utility of those earlier trials. He does not substantiate what we take to be his assumption that failure to prosecute the previous trials energetically encouraged the later German leaders. He offers no support for the apparent implication that stricter trials after this war will make another war less probable.

A serious analysis of methods for disciplining a defeated enemy need not be conducted on the extreme level of common sense ethics nor on that of legal technicality. Implying, on the one hand, that because a limited use of a given means failed before, more stringent treatment would succeed today is not evidence. There are, on the other hand, principles of social behavior by which we may evaluate the appropriateness of alternative policies of victorious nations toward defeated opponents. In this ar-

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ticle, I present a sociological analysis of the proposals for the trial and punishment of the Nazi leaders.

It is not my intention to survey the whole problem of post-war international relations. There is no attempt to encompass the question of the legal validity of the trials. There is not space for an evaluation of alternative programs of conciliating or ruling defeated nations. The specific proposal under discussion deserves separate analysis, both in terms of its stated aim and because it is indicative of a general approach to the broader question of the relationships between conquerer and conquered.

I. RECONSTRUCTION IN THE AMERICAN SOUTH

It is curious that Americans who are striving to inaugurate a new international order after this war apparently have neglected to study that postwar situation of which we have the most intimate knowledge and the bitterest experience. None of the groups advocating trials of "war criminals" gives evidence of having carried out comparative studies of peace settlements as guides to dealing with the contemporary international situation.[3] The relations between North and South after the Civil War sufficiently resemble the blueprints now being drawn up for the treatment of Germany to suggest certain relationships between the manner in which an enemy is treated after defeat and the prospects of reconciliation. Since North and South were parts of the same nation, reconciliation should have had a better chance of emerging than if the opponents have been separate nations.

The North had won an unquestioned military victory; the South was in no position to block or sabotage any punitive measures the North saw fit to impose. Northern armies were in occupation; Northern agents administered law and shared in the management of the economy.[4] Some of the Confederate leaders were tried and a few executed; thousands of others were punished in milder degree. Eventual amnesty to the innocent and repentant, together with pardons on a generous scale, expressed a wavering intention to discriminate between guilty leaders and innocent followers. The previously disfranchised whites and enslaved Negroes were mobilized to aid in enforcing the penalties and in other projects to establish the new order. There were also tangible inducements to collaboration in the prospect of eventual restoration to full participation in a prospering national union.

The results of that Reconstruction policy are recorded in every elementary textbook on American history. The South was unreconstructed,

[3] As Americans may profit from study of the Reconstruction period, so English jurists might well ponder the history of English-Irish affairs.

[4] Two informative studies are R. S. Henry, *The Story of Reconstruction* (Indianapolis, 1938), and Paul H. Buck, *The Road to Reunion, 1865–1900* (Boston, 1937).

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embittered, estranged. The readjustments had to be tackled again years later—in fact, we have barely begun to cope with them—under much greater handicaps. Few "enlightened citizens" in the North today would deny that the treatment of the South was misguided and futile. It is unlikely that many persons think that the South was treated too mildly. Yet, not even Southern leaders today discern the resemblance between the ordeals of their forebears and the current design for trying the Nazi leaders and punishing Germany. Indeed, if one may judge from the public opinion polls, strong handling of Germany would enlist at least as much support in the South as in other parts of the nation.

In view of the parallels of ideology as well as policy to the plans soon to be attempted, a closer look at the Reconstruction process may prove instructive. The South, we are told, acknowledged the fact of clean-cut military defeat, although with considerable justification it attributed the disaster to economic power more than to tactics or valor. Yet Southerners were oppressed by no deadening sense of guilt. The vanquished were resigned but not repentant. They would not dishonor their dead by pretending shame.[5]

To the North, victory was something won at a high price and must be preserved.[6] The lust for vengeance subsided for a brief time into a more conciliatory spirit, a desire to return to work and fireside, and hope that the wounds of war could be healed and the union again become one. But the animosities aroused by the crusade of war and by propaganda[7] would not sustain the mood of leniency. Each side had built up a distorted picture of the other. The North was able to act upon its preconceptions and to implement its determination to achieve justice after victory. The fiction that the South was a caste system of many aristocrats, a few poor whites, and bludgeoned Negroes nurtured anxiety that the victory would be stolen by the cunning of the slavocracy.[8]

High ethical affirmations resounded, as is the way in conflicts. The right had triumphed. The North believed it had been "God's agent in overcoming and chastizing an iniquitous opponent."[9] With a clear conscience, a stern policy was "cloaked as God's directing and righteous will."[10] The North must regenerate the South after destroying its power. A society of ex-slaveholders could not be trusted. "The God who had presided over the tribunal of arms had given a mandate to His chosen ones which it would be sinful to disobey."[11] "Reconciliation would be a weakness if it

[5] Henry, *op. cit.*, p. 25. [6] Buck, *op. cit.*, p. 4.

[7] Prison atrocity stories (later disproved almost totally) were a major element in this propaganda. See W. B. Hesseltine, *Civil War Prisons; A Study in War Psychology* (Columbus, Ohio, 1930).

[8] Henry, *op. cit.*, p. 31, and Buck, *op. cit.*, pp. 7, 18.

[9] Buck, *op. cit.*, p. 11. [10] Buck, *op. cit.*, p. 10. [11] Buck, *op. cit.*, p. 4.

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glozes over the criminality of the South," said Beecher.[12] "Do you really think that Massachusetts could govern Georgia better than Georgia could govern herself?," Senator Sumner was asked. "That is Massachusetts' mission," he replied.[13] To these fears lest the victory should be lost after it had been won, and to the righteous conviction of obligation to reform the erring brother, was added the fear that Republican party majorities in Congress would be jeopardized. An orthodox theory of guilt emerged to convince Northerners that "any postponement of justice is postponement of peace."[14]

"The 'magnanimous' peace was thus converted into the 'just' peace, which when unilaterally applied is mere euphony for a 'victor's' peace."[15] To the South, "force, not reason and not right, had been the arbiter."[16] Yet the two sections were not unmovably fixed in their positions, for, as I read the historians, the acknowledged leaders in the South at first counseled acceptance of the outcome of the war and an honest effort to begin remaking Southern society. The cause of moderation lost, however, largely because of the North's intransigency and the resentment aroused by accusations of wickedness and demands for proscription of the tested leadership of the South.

Reconstruction failed also because of Northern inability to admit that peace had come, because the North was determined to conquer the Southern spirit as it had conquered Southern arms. Interference with the courts and the protection of scoundrels by the reconstruction military governments created no sense of justice in Southern minds and no enduring basis for order. Second-rate men and "foreign" adventurers gained power through the dethroning of Southern leaders and the manipulations of politicians seeking to maintain Republican supremacy. These attempts to reconstruct—today we would say "democratize"—the South reflected ignorance of the social structure and war-generated prejudices as well as deliberate exploitation.

The results and the procedures of the trials of the rebel leaders pleased neither side. The unfair military trial of those accused of assassinating Lincoln sickened even the North and led to the demand that later prosecutions be held in the civil courts.[17] Nor did the civil trials satisfy. Jefferson Davis' trial "had become in [Southerners'] eyes, their trial; his guilt their guilt, his treatment their treatment."[18] The third section of the Fourteenth Amendment, said one of the more liberal Northerners, Senator Trumbull, required Southerners "to put some sort of stigma, some sort of odium, upon the leaders of the rebellion" and in fact upon nearly all who

[12] Quoted by Buck, *op. cit.*, p. 56. [13] Quoted by Henry, *op. cit.*, p. 133.
[14] Buck, *op. cit.*, p. 10. [15] Buck, *op. cit.*, p. 8. [16] Buck, *op. cit.*, p. 34.
[17] Henry, *op. cit.*, p. 36. [18] Henry, *op. cit.*, p. 240.

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had been influential and respected before and during the war.[19] Finally, amnesty put an end to most of this farce. The capstone was a Supreme Court decision that the test oaths of past loyalty were void as being punishment of whole classes of persons for acts not criminal when committed.[20]

We may substitute Fascism for Southern Slavocracy, sanctity of international law for what our grandfathers called God's will, United Nations courts for the Freedman's Bureau. The changes of names and the differences of date do not destroy the import of this evidence. Can we not conclude that if Lincoln's mild measures of reconciliation had been persisted in, there would today be a smaller residue of hate and fewer unsolved problems? Far from reconstructing the South, Reconstruction contributed strongly to establishing the Solid South and the Black Codes and the tradition of violence that have cursed the South to this day. Readers who doubt the relevance of this historical example to the present problem of dealing with Germany may take the position that it was unskillful administration and corrupt government of the South that produced these results rather than the trials and the effort to rule the South for a probationary period. My judgment is that the Reconstruction experiment has more to tell us that will be helpful in our present dilemma than just a tale of "poor administration of a sound plan." Not least important is the illustration of the tendency for attitudes toward enemy leaders and attitudes toward enemy peoples to run together. I would suggest that the blunders of the North were inherent in the effort to "reconstruct," that the results are typical in kind if not degree of what will occur in similar situations.

II. EVIDENCE FROM CRIMINOLOGY ON THE EFFECTS OF PUNISHMENT[21]

At one time and another, various theories justifying punishment have been accepted. Leaving aside those dependent upon supernatural arguments, punishment has been credited with reforming the criminal into a law-abiding person, deterring others from committing the crime for which previous individuals were punished, making certain that retribution would be fair and judicious rather than in the nature of private revenge, and enhancing the solidarity of the group by the collective expression of its disapproval of the law-breaker. Contemporary criminologists give short shrift to these arguments. In any practicable form or degree, particularly in a "humanitarian" and urban and differentiated society, physical punishment has slight utility.

Moral attitudes and norms of conduct are acquired in too subtle a manner for punishment to be a reliable incentive. It is significant that the

[19] Quoted in Henry, *op. cit.*, p. 167. [20] Henry, *op. cit.*, p. 215.

[21] This discussion borrows heavily from E. H. Sutherland, *Principles of Criminology* (3rd ed., Philadelphia, 1939), pp. 356–368.

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conduct of school pupils has improved over the years as corporal punishment has been abandoned. Capital punishment shows no stable correlation with the level of crime or with the crime-rate before and after the death penalty is introduced or abandoned.

Even a slight knowledge of the processes of personality development should warn us against the old doctrine of original sin in a new guise. Since punishment estranges the victim and antagonizes him, he can hardly be expected to adopt willingly the conduct of his punisher—a point that has some bearing on the idea of rehabilitating minor Nazi officials. In the unlikely event that he does not gain status and glamor by being punished, his self-respect may be destroyed, and with it his capacity for becoming an accepted member of normal society. Nor does fear of being punished for violating a rule elicit an appreciation of the values behind that norm. Punishment does make the individual wary, but it is more likely to make him wary of being caught than of becoming a criminal. If he deliberates at all, it is not the possible penalty that is weighed heavily, but rather his chances of escaping a penalty.

So far as concerns the effects upon the group administering the punishment, for the most part the members give no thought to the event. If their interest is mobilized by publicity or the character of the offense, their response is more likely to be a sadistic outburst or a melodramatic thrill which nourishes the tradition of violence more than it enhances the realization of the need for better instruments of social rearing and control. Lynchings, for example, do not increase the understanding among whites of the problems of Negroes. The determination by a group to make punishment frequent and strict also blocks efforts to understand the reasons for the occurrence of crime and damps motivations to develop constructive policies.

Whether the problem concerns ordinary civil crimes or plans to punish defeated war leaders, the social scientist raises the broad questions: What is the purpose and the utility of punishment? Does punishment accomplish its purpose? To fall back upon discarded and exploded theories of punishment in attempting to work out new international relationships is to ignore one of the great bodies of knowledge in the social sciences and to adopt a new "devil theory" of human behavior.

III. TRIALS OF WAR CRIMINALS AND DIVERSION OF ATTENTION FROM OTHER POSTWAR PROBLEMS

In working through an analysis of this phase of the question, I have tried to picture the somersaults of public opinion during a war period. Upon the conclusion of an armistice, there is a brief interval marked by a sense of relief, sympathy for the sufferings of the enemy people, recognition of sacrifice and heroism on both sides, and impatience to return to normal

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life. The bitterness of war is in abeyance. Awareness of the need for drastic international reforms is temporarily acute. But when the diplomats sit down to draft the peace terms they meet as conqueror and vanquished, not as spokesmen of their peoples' craving for a durable peace and hopes for a "bright new world." The situation predominantly is defined by the war-induced pictures that each nation retains of the other, distorted as they are by hatred, propaganda, and stereotyped concepts of guilt. To the victors, severity and "justice" are more comfortable attitudes than forgiveness. As the years go by, attitudes soften again; the victors may even feel regret because of having imposed drastic terms. But since during this same interval memories have dimmed and nationalistic interests have become ascendant, the urge to work out an enduring peace is enfeebled.

If the leaders and the opinion-formers of the winning nations were determined to have a moderate peace, they might, by a proper timing, appeal to the brief first outburst of magnanimity for support of plans with long-run promise. Once passed by, this mood will not return for years, by which time the defeated and punished enemy is unreceptive to belated generosity.

The contribution which trials of Nazi leaders might make to the cultivation of international attitudes and legal order should be compared with alternative dispositions of time and of public moods during the closing phases of the war and the early post-conflict months. If leaders urge the inauguration of these trials as the first order of business, the receptivity of the victorious peoples for a mild peace and a genuinely constructive international order quickly will be drained off and the defeated peoples will lose hope of justice. Of the two sentiments, a mild peace and a world order, internationalism is the harder to cultivate and sustain, but a mild peace is probably the prerequisite for the development of internationalism. The turbulent emotions aroused by watching trials of hated enemy leaders and the maneuvers of treaty-making will leave little room for consideration of the fundamentals of world union. After feeling reformist for a season, the public will return to daily concerns and the basic readjustments will go by default. The public must be committed to international plans while converted and enthusiastic. Moreover, the isolationists will quickly organize a last-ditch battle against any surrender of sovereignty. When the urgency of fear is lifted, world-planning will be a pale ideal. To put trials of the Nazi leaders high on the postwar agenda is to use big emotions for small ends.

Talk of trials and penalties would divert attention and create impatience with discussion of constructive policies requiring a generous spirit. Public understanding of the real conditions of peace would not be increased, but rather confused, by all the emphasis upon one detail, the trials. By their ritualistic nature, dramatic trials would fail to build respect

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for justice. The vindictive and oratorical pleas of the prosecutors in the language of emotionalized generalities would entertain rather than educate. (If one thinks the trials could be held in judicial privacy, he should reflect upon the furor when it was proposed to conduct the recent international food conference without assistance from the press.) When the trials were over, the public would have become emotionally exhausted, and there would likely be a nagging suspicion that the victim had had his due. If genuine bases of enduring peace failed to become established, there would be a temptation to conclude that the trials had been a farce, and so—why not forget all this talk about world law and order? Ritualistic trials—and in the circumstances the trials would almost certainly have this character—are poor devices for showing the public how to prevent more trials of the same kind in the future. How many glamorous murder trials in civil life tell the public anything about the causes of crime? The fact that their leaders initiated these postwar trials, participated in them, and endorsed them as primary steps to peace would lead the public to believe that the problem was now settled, war-mad dictators a thing of the past, and everyone free to go back to listening to the ball game.

The trials may justifiably be called ritualistic also in that proposals to try the "Axis criminals" make the tacit assumption, or encourage the public to assume, that the victors bear no original responsibility for the war or the manner in which it was conducted. A trial conducted on this basis is not essentially an inquiry into facts, but a collective expression of sentiment—in this case of retributive and aggressive sentiment. Guilt is usually an elusive idea, especially when it is to be assigned under the pressure of strong emotions stimulated and snarled by wartime propaganda.[22] Formalized court procedures do not assure judicial attitudes. If the ultimate goal is the building of an international order, then full-dress trials of enemy rulers contribute little to a comprehension of the causes of war or the conditions of peace. The trials would use up the precious little thought that a peace-bound public would spare for the blundering past or for indefinite future events.

IV. THE PROBLEM OF INSURING THE LEGALITY AND FAIRNESS OF THE TRIALS

While one who is not a jurist must approach this question modestly, there is evidence within the proposals themselves (so far as they have been revealed in published articles) making it doubtful whether the trials would

[22] "But historical truth cannot be established by international treaty—least of all by a treaty imposed by victors on vanquished. The Allied governments, in the passion of the moment, failed to realize that this extorted admission of guilt could prove nothing and must excite bitter resentment in German minds." E. H. Carr, *International Relations since the Peace Treaties* (London, 1937), p. 46.

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be fair either in the judgment of objective scholars or to the peoples of the defeated nations. It is my impression that most discussions of the offenses for which punishments are to be imposed either play fast and loose with the definition of crime or take a formalistic position that ignores the sociological relationships involved in the situation. While abstract legal doctrine may support some of the indictments, the peoples of the defeated nations might quickly decide that their late leaders were not receiving fair treatment. If the trials are to create respect for international law and inaugurate international tribunals, the definition of offenses and the procedures must conform to accepted ideals of fairness. It would be essential that the peoples of the defeated nations, not only those of the United Nations, be convinced that the courts conformed to these standards.

There are those who say that if these courts were set up during the war, so that they should be ready to function on the day of the armistice, the support of the United Nations peoples would be gained, and that they would then feel committed to continuing the courts in the later years of peace. But just because the courts might acquire prestige during the war and immediately thereafter, it does not follow that this favorable point of view would persist. Peacetime after war brings profound transvaluations, and it is not improbable that opinion, even among the victors, would later come to be that the methods of the courts had not conformed to more reflective norms of justice. The same public could continue to believe that the particular punishments had been deserved and expeditiously imposed without obtaining therefrom a greater faith in international law. How much more difficult, then, is the task of winning the allegiance of the defeated peoples!

Definitions of crime tend to be in large measure conventional or casuistic. Considering the atmosphere in which these trials would be conducted, and the popularity of horror tales in wartime, the language employed by some of the writers advocating the courts is of a character to suggest caution. We are asked to think of offenses against the laws of humanity and violations of the laws of warfare. The "customary and conventional international law" would not unlikely be defined by righteous-minded victors so that these categories would become as broad as the Nazi "crimes against the state and the welfare of the German folk," or as elusive as the "disloyalty" for which hapless citizens suffer in nations at war. Simple murders and sadistic prosecutions are clear-cut in innumerable instances, but to rely upon these as bases for trials conducted by the victors offers another kind of difficulty that will be discussed below.

"The laws of humanity" and similar phrases are respected symbols of civilized aspiration, and powerful weapons of propaganda. Even when jurists construe offenses more strictly, the public would read into the legal

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phraseology the looser and more emotional symbolic meanings. People of every nation would do this. Under the conditions of war or of peace enforcement, such misunderstanding of what the more scrupulous lawyers were attempting would rebound against the efforts to have the courts conform to legal rules or lead the public to decide that justice is too ponderous to be just.

The definition of crimes for the purposes of these courts runs up against another obstacle. It is somewhat difficult to comprehend how, while a war is in progress, it would be legitimate to make the violations of Hague conventions into what Professor Glueck calls "ordinary" crimes. This transmutation would seem to require a conference with the present enemy nations in attendance. Most of these wartime offenses have not hitherto been interpreted successfully as ordinary crimes for purposes of court action. To begin now would create the impression of punishing retroactively for acts that were not commonly regarded as crimes when committed. Certainly the citizens of the soon-to-be-defeated nations might understandably take that position. Surely it is not cynicism to say that the laws of war, so-called, have been observed just so long as urgency did not put too great pressure upon ethics and good-will. Moreover, the normal amount of retaliation occurring in any war goes some distance toward redressing this account.

Professor Glueck proposes that the United Nations state here and now that henceforward neither desperation nor orders from superiors shall constitute immunity from punishment for committing these "crimes." Waiving the question of the expediency of trying to define the limits of military authority within another nation, it is word-chopping to try to decide when departure from the chivalric code of battle is justifiable. How can we evaluate the direness of the situation from the enemy's point of view? If desperation of defense is no excuse for acts of inhumanity, then such a potent but inhumane policy as the Allied naval blockade of the Continent is also a crime. If desperation is a mitigating circumstance, then we must enter upon a prolonged and futile debate over the relative novelty, legality, and humaneness of various techniques for destroying an enemy.[23] The embittering nature of these debates is illustrated by the effects of maintaining a blockade during the armistice period after the last war while at the same time clamoring for the trial of German war criminals.

Would a resolution by the United Nations denying Nazi officials or soldiers the plea of having acted on orders and for the interest of their

[23] As for Great Britain's defense of the blockade in wartime: To oppose it was " 'appealing to the letter of international law but ignoring the spirit. . . . It was a question rather of international morality than of international law'." Quoted in J. W. Garner, *International Law and the World War* (New York, 1920), Vol. 2, p. 321.

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country appear just to their fellow-Germans? A defeated people who have fought bravely against what they regarded as enormous odds—however mistakenly, upon later reflection—would not accept such a novel interpretation of duty. In simple cases of brutality, there might be no complaint, but the subtler cases would arouse ferocious nationalist sentiment. Nationalism is not undermined by arousing its most violent manifestations. "In January, 1919, Max Weber predicted that a penal peace would 'turn the most politically radical German worker—not now, but in a year and a day, when the present tumult and the succeeding weariness are past—into a chauvinist!'"[24] If we attempt to police Germany and try the Nazis, "this would easily be the means of creating for future German generations the legend of a German Joan of Arc, the patriot who was done to death by the foreigner. Or, if accompanied by suppression of a people's rising, our forces might enter the German folklore as those who 'liquidated' a people's revolution only to take over Hitler's rôle."[25]

Evidently the drawing up of a modest and specific list of offenses for which Nazi officials should be tried is not a casual enterprise. No less difficulty would be experienced in making the procedural aspects of the trials conform to reasonable standards of justice. Here again, we are told, an important aim is to enlist the loyalty of the defeated nations to ideals of international law. But, as Ehrmann says,[26] "probationary periods," "when Germans have proved they have given up militarism, they will be admitted to the collective security system," "limited permissions," "drastic economic sanctions," and "proper supervision"—all these are phrases reported as being used by those allegedly drawing the plans for administering German life—do not manifest a judicial attitude or an understanding of collective psychology.

Some persons prefer that the trials be conducted under military law. They would concur in Quincy Wright's judgment some years ago that "as military jurisdiction is not terminated by the end of hostilities, or even by the end of war, and as it is not limited by the usual immunities of sovereigns, the liability of the Kaiser before a military commission seems clear."[27] Others would take Garner's view that cases of this sort are not governed by international law, but by expediency and international policy.[28] In this writer's judgment, to use an army of occupation for this

[24] E. H. Carr, *Conditions of Peace*, p. 226.

[25] Dorothy Thompson, *op. cit.*, pp. 54–55.

[26] H. W. Ehrmann, "Washington's Plan for Germany," *New Republic*, May 3, 1943, p. 587.

[27] Q. Wright, "Legal Liability of the Kaiser," in this REVIEW, Vol. 13, p. 125.

[28] J. W. Garner, *op. cit.*, p. 495. The difficulty of keeping one's thinking straight under the emotional pressures of wartime is neatly illustrated by Garner's remark on the next page: " . . . even if there were no precise precedents for traducing former heads of States before international tribunals, that in itself would constitute no valid

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purpose runs against the objection to using coercion to bring about trials which are supposed to enlist the sympathies of the vanquished for the fairness of international law.

Because Germany succeeded in largely circumventing the demands for trial of the accused after the last war, it has been suggested that this time we should demand the surrender of those on the "black list" as a condition of the armistice rather than of the peace treaty, or that we take them into custody when we occupy the country. This action would be to continue the war after it had ended, and it would imply that the defeated nation cannot be trusted to coöperate in the administration of justice.[29] This kind of blackmail has dubious value for building respect for international law. The intensity of frustration and nationalist rage that would result—if not immediately, then a few years later—may be easily imagined. To hold up the enemy to conditions that will appear coercive beyond all reason will not create willingness to coöperate in postwar adjustments. There is questionable value in adopting a new and more subtle form of the same hostage system for which the surrendered leaders are to be tried. To demand the surrender of German archives, as evidence to be used in court against the men on trial, would be an affront to national symbols. We might remember the rankling sores in American life created by the retention of Confederate flags in Northern states. If this is the only tactic by which the leaders can be brought to trial, we may as well abandon hope that the trials would enlist support for international tribunals.

A new régime of law can be launched and succeed only if the full loyalty and conviction of the lately defeated nations can be gradually won. The Germans must believe that the aspirations they have cherished and some of the ends for which they have fought can be achieved with most certainty and least cost by joining a truly coöperative international order. They must feel confident that future conflicts of interest can be worked out peaceably. The victors, too, must be able to view the war as a mutually produced fact and not a unique sin of the losers.

In the light of these specifications, an additional important objection to plans for postwar trials of the Nazis is the assumption that the trials will be unilateral. The victors would try leaders of the defeated nations, and in spirit the nations too, for crimes against international law and for violations of the laws and customs of warfare. Would not this procedure violate the principle that a party to a legal action cannot be judge and jury for his accused opponent? What would be the probable effect of such

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reason for not putting the former German Emperor on trial, for the reason that the offenses for which he was charged were without precedent. . . ."

[29] See the discussion of the trials after the last war in E. H. Carr, *International Relations since the Peace Treaties*, pp. 47 f.

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a proceeding upon the attitudes of the German people? "Did Germany revert, after the last war, to a new militarism because she was left with a strong army—or because she was unilaterally disarmed in a Europe of armed nations?"[30] "Had the passions of the time permitted the Allied Governments to make the arrangement [for trials of war criminals] reciprocal, and had they been willing to bring to trial any of their own nationals accused of similar offenses by the German Government, the whole procedure would have been a valuable innovation and an earnest of the desire of mankind to make international law an effective reality."[31] "Particularly after 1919, the slogans of internationalism were used, in the League of Nations and elsewhere, to resist German claims; and this further increased German suspicions of internationalism in general. . . ."[32]

We are admonished to begin filling dockets now with evidence against particular Axis officials and soldiers. One must ask if there are no corresponding violations among the victors. Granted that the list of charges against Germans is much longer and more shocking, a sense of justice is not nourished by considering only the net excess of crimes on one side, nor does such a reckoning remove the obligation to make the trials bilateral. There has been no invitation to supply accusations or evidence against any of our people who may have violated the rules of war. The failure to issue this request, however needless or however routinely, suggests a lack of thoroughgoing interest in international law as such. The omission raises the question of whether those most vehemently demanding the trials of the Nazis may be talking about the victor's revenge rather than about justice under international law.

The writer concludes from the foregoing evidence that punishment of our enemies has little likelihood of motivating them to adopt our values. Participation in a new order must start from now, with all on the same footing. Beginning a new régime of law by punishing defeated leaders in our courts with unilateral and self-righteous justice will not convince the defeated that we believe in justice. I have already discussed the ways in which the trials would arouse the German people, and I shall come back to this point. The distinction between enemy people and enemy leaders would not stand up in practice. The successive public opinion polls in recent years have shown a progressive tendency for the American and British peoples to identify the Nazi leaders and the German people. Other evidence of this identification appears in such phrases as: "But this time the Germans will have to learn to be good the hard way."[33]

V. CONTRIBUTION OF THE TRIALS TO THE ELIMINATION OF WAR

As a precaution against emotions generated by the current situation,

[30] Dorothy Thompson, *op. cit.*, p. 52.
[31] E. H. Carr, *International Relations since the Peace Treaties*, p. 48.
[32] E. H. Carr, *Conditions of Peace*, p. 219. [33] K. Smith, *op. cit.*, p. 21.

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one can ask whether more zealous prosecution of the trials after the last war would have made this war less probable. Perhaps German citizens might have experienced a moral conversion if the guilty had been tried and actually served their sentences.[34] It is difficult to see just how such a policy would have significantly minimized the tensions from which the present war emerged. Nor does it do much good to lecture defeated people about the sanctity of international law when they are convinced that they had no adequate remedy in such law for the grievances to resolve which they followed their perhaps reckless leaders into war.

In dealing with this intricate problem, it is unfortunate that we lack any systematic analysis of peace treaties and settlements in relation to the grounds of later wars. But the following two statements by Carr seem to me reasonable conclusions from the available evidence: "In 1815 the Powers who had overthrown Napoleon perceived that if they wished the restored monarchy to survive in France, they must treat it with consideration and respect. The victors of 1918 showed no such wisdom . . . they exposed [the German Republic] to such constant humiliations that it could never hope to win the loyalty and affection of the German people."[35] "At the end of any war, the victors evince a natural eagerness to exact retribution from the losers. In Europe, this eagerness appears to have been gradually intensified throughout the nineteenth century, reaching its culmination in 1918. . . . The desire for revenge has, however, on occasions been restrained; and these occasions have generally produced the most satisfactory and durable peace. The Vienna settlement of 1815, the Prague Treaty of 1866, and the Vereinigung Treaty of 1902 are the most familiar modern examples. . . . The experience of 1919 seems equally decisive against the imposition of personal penalties."[36]

Even if punishment of war leaders does not create respect for international law and desire for peace, does it affect potential future leaders? With reference to Germany specifically, it is difficult to demonstrate that the leaders who "should have been" punished after the last war would have been able to take over the Nazi movement when it began its rise to prominence. Hence, destroying the leaders in power during the last war would have failed to prevent the rise of the Nazis. Most of the later Nazi leaders would have gone unrecognized at that time, even if anyone had been expecting such a movement to develop—and few were. Those who watched the Nazis a few years later seem to have been unable to realize that they had the ability to get into power. At the end of one war, in

[34] But see Carr: "A public trial by the Allies might well have revived the ex-Kaiser's lost prestige in Germany, and turned him into a German national hero and martyr." *International Relations since the Peace Treaties*, p. 47.

[35] E. H. Carr, *International Relations since the Peace Treaties*, p. 45.

[36] E. H. Carr, *Conditions of Peace*, p. 234.

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short, it is impossible to predict what individuals will rise to lead the next war. Destroying those who ruled after the last war would have left a clearer field for a rising clique of adventurers. And in any event, as the data of criminology show, punishing one generation of "criminals" is unlikely to deter imitators.

But, after all, leaders have followers; and it is a usual assumption in the social sciences that one learns more about social movements by studying the followers than by observing the leaders. Since this is an epoch of nationalism, stigmatizing a nation's leaders may only enrage the defeated and humiliated nation. The Nazis certainly profited from the resentment of Germans over the few trials that were held after the last war. While it is true that after a defeat there is often a repudiation of wartime leaders, if they have not been martyred, what attitudes follow next after this gesture depends upon many conditions. Among the factors, I should include the success of the new leaders in restoring order, prosperity, and pride; but we must also consider how the attitude of the victors and their treatment of the losers will affect the success of the new leaders in these tasks. When the defeated nation is heavily punished—despite promises to distinguish between innocent people and guilty leaders—and in addition its late rulers are accused of guilt, national loyalty may turn and defend those same rejected leaders as well as create a desire for revenge upon the victors.

Critics of this analysis may say that it rests upon false assumptions about the relations between people and leaders, and that the enemy peoples are really unwilling and intimidated coöperators in a war whose purposes and programs they reject. Whatever the motivations at work, it seems to me more reasonable to assume that leaders and people are essentially united for the purpose of winning a war. To punish these leaders on an extensive scale—particularly when we keep in mind the newspaper obbligato in the victor nations about war guilt—may impel their erstwhile followers to say: "Our leaders could not really have been such villains, else how could we have followed them so loyally?" We may strive to make the trials fair, but the reasons we would offer for holding the trials at all would reveal that we were in fact judging the whole nation. Such hostile attitudes are usually reciprocated. "No new generation in any nation will take upon itself the guilt of its father."[37]

The subtleties of this identification of follower with leader require emphasis, for this is a pivotal point in deciding upon the utility of these trials under the auspices of the winning nations. We have already examined the American South after the Civil War. Two other kinds of examples from American folk culture may drive the point home. Lynching

[37] Dorothy Thompson, *op. cit.*, p. 53. See again the quotation from Walter Lippmann in note 2, *supra*.

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mobs supply one illustration. Authorities from outside a local area find it virtually impossible to convict, or even try, the members of a lynch mob. If brought into court, at least until very recent years, they are likely to become heroes for a day. The important element here is not that the respectable members of the community necessarily approve of the outbreak; they typically do not, and have not for many years in most communities. But these same community leaders will refuse to identify the participants, and they may even congratulate them on escaping punishment. This seemingly paradoxical action flows at least in part from an attitude that the lynchers were expressing an important sentiment and that it is not for "foreigners" to challenge that sentiment.

A second dramatic illustration occurs on occasions when a man kills his wife's lover. Courts and legislators have not successfully brought this act under the category of murder in the eyes of the folk. Almost invariably, public sentiment will favor the aggrieved husband if he is subjected to the ignominy of trial. These same citizens will deplore his behavior, and they may even run him out of town on a rail. But when outside accusers and impersonal justice enter the picture, the husband becomes one of themselves who is being persecuted for upholding the honor of men and the sanctity of marriage. After all, man holds many sentiments simultaneously, and respect for law as law is not usually one of the strongest of his loyalties.

My conclusion is that if we are seeking to assist in the abolition of war, the trial of defeated leaders by their conquerors is inappropriate. (Incidentally, one hears very little demand among military men for punishment of the enemy.) The justifications that may be offered for such trials do not touch the basic causes of war. Future leaders who might lead another war are not eliminated. The attitudes that the victors would have to adopt, in this day of mass democracy, in order to assume so heavy a responsibility contradict the conditions of international relations upon which peace must rest. The defeated nations would not be conciliated. The trials would drive victor and vanquished farther apart than they were at the end of hostilities.

VI. RESTRAINING THE DESIRE FOR VENGEANCE

Some persons take the position that if we can prevent a reign of terror by prompt policing of the countries that have been occupied by Germany, we can well afford to neglect the trial of German leaders. Others, however, believe that a more effective way of softening the thirst for vengeance is to make it clear that we shall punish the leading Nazis and also selected representatives of lesser officials from lists submitted by the occupied peoples. In my judgment, the proposed trials cannot play so central a rôle in this problem.

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It is possible that this is one of those problems which we never have to solve because circumstances eliminate the problem. If the lust for revenge is so great, then revenge will have been taken on a large scale before the Allied armies bring the countries under control. If the demand for revenge is slight, then there is no special problem. Trials held months and years after would add little satisfaction to an already sated desire for revenge, and would be too remote alone to satisfy that desire. Would a few trials of leaders have the dramatic appeal needed to impress these millions of people, who have suffered from the acts of lesser officials, that justice had been done? In short, if the occupying armies can move in fast enough to establish order, mass revenge can be prevented. Postponed revenge would have little greater value in this instance for building a basis of international law than in the others already discussed. To turn accused Germans over to the new officials of the occupied countries to do with as they wish is to take direct responsibility for the conduct of these officials and makes us liable for any dissatisfaction on either side that may develop later.

VII. SUMMARY

The appropriateness of particular actions to the maintenance of peace is more difficult to demonstrate to public satisfaction than is the efficiency of military tactics. In the controversial realm of social policy, we are tempted to judge our actions in terms of logical abstractions or sentiments and to reject the pragmatic test. So we find scholars of repute endorsing plans for the trial and punishment of enemy leaders upon whom we believe it just to lay the guilt of war and persecution. Before any program of this tendency is accepted, those and other scholars should ask some crucial questions. Even if the enemy are unmistakably guilty, can we actually bring them to punishment? If we punish them, will we strengthen our plans for a world order? Just what is our motive for demanding punishment? The conclusion which the writer of this paper reaches, on the basis of what he believes to be pertinent evidence and established principles of social action, is that trial and punishment of Nazi leaders by anyone other than their own countrymen will in fact tend toward the results we are striving to avoid.

An examination of the comparable Reconstruction period in our own national history led to the conviction that penalties against the leaders—and unavoidably with them the followers—of a defeated group hinder reconciliation and provoke fresh tensions. Similarly, civil punishment of individual criminals in normal society reveals only meager utility for penal controls.

On the basis of our tentative knowledge of the unstable attitudes of national publics during the transition from war to peace, it appears that if

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public attention were focused upon the proposed trials, postwar programs of international rehabilitation would be shorn of support. The conditions under which the trials would almost of necessity be held and the pictures of the enemy that we would continue to carry in our heads would deprive the trials of legality and fairness, and would in fact jeopardize such little respect for international law as might remain.

Let us assume—what we judge to be contrary to fact—that an airtight legal case can be made out for holding the trials and that all the formalities of fair trial can be satisfied. This does not make the trials sociologically appropriate, for it does not make them fair to the people of the enemy countries. If the trials would excite nationalist sentiments, however they were conducted, then it seems unwise to hold them, whatever their formal legal status.

Trial and punishment of Axis leaders by a United Nations court would contribute little to our success in controlling the demand for vengeance among the peoples who have been ruled by the Nazis. Other methods must be devised for this purpose.

There seems no sound reason to believe that trials of enemy leaders after one war deter the leaders of a prospective future war. And, by virtue of the intimate symbolic relationship between a nation and its leaders during a time of tribulation, punishments of leaders by outsiders is punishment of the nation itself. The causes of war are not in this way mitigated; rather, the spirit of nationalism is inflamed.

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NEWS AND NOTES

PERSONAL AND MISCELLANEOUS

Compiled by the Managing Editor

Following the regular practice, the nominating committee of the American Political Science Association has canvassed the membership for suggestions for nominations for officers for 1944, and at the January meeting it will offer the following list of nominees: president, Leonard D. White (University of Chicago); first vice-president, Charles G. Fenwick (Bryn Mawr College); second vice-president, Clarence A. Berdahl (University of Illinois); third vice-president, Cullen B. Gosnell (Emory University); secretary-treasurer, Kenneth Colegrove (Northwestern University); assistant secretary-treasurer, Harvey Walker (Ohio State University); managing editor, Frederic A. Ogg (University of Wisconsin); members of the Executive Council: Arthur W. Bromage (University of Michigan); Frederick S. Dunn (Yale University); J. A. C. Grant (University of California at Los Angeles); Charles G. Rohlfing (University of Pennsylvania); and E. E. Schattschneider (Wesleyan University). The nominating committee consists of James Hart (chairman), Thomas S. Barclay, Charles M. Kneier, Frederick A. Middlebush, and Thomas Reed Powell.

Professors Clyde Eagleton, of New York University, and E. P. Chase, of Lafayette College, have been added to the staff of the Division of Political Studies in the Department of State.

Professor Arnold J. Zurcher, of New York University, has been appointed visiting professor of government at Yale University for the autumn term beginning November 1. He is lecturing in the introductory undergraduate course in American government.

At Butler University, Dr. Franklin L. Burdette has been advanced to an associate professorship, and Dr. David M. Silver to an assistant professorship, of history and political science.

Dr. William P. Maddox, on leave from the University of Pennsylvania and formerly serving in London with the Office of Strategic Services, has been commissioned a major in the U. S. Army and assigned to North African duty.

At the University of Illinois, Professor Clarence A. Berdahl is chairman of the faculty committee in charge of the Area and Language Study Program of the ASTP. Emeritus Professor John A. Fairlie is assisting in the Army Graduate Program.

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Dr. Alfred G. Buehler, of the University of Pennsylvania, was employed during the summer by the Pennsylvania State Chamber of Commerce as a federal tax consultant.

Sir Bernard Pares, formerly head of the School of Slavonic Studies at the University of London, is spending two months in residence on the campus of the University of Wisconsin, where he is lecturing under the auspices of the political science department and completing a book on "Russia and the Peace."

Dr. Hans W. Weigert, of the department of international relations of Trinity College, has been appointed professor of area studies and political science at the University of Pittsburgh, to organize Civil Affairs Training courses on Germany.

Mr. Henry Reining, of the Institute of Public Affairs, Washington, D. C., and Professor Leonard D. White, of the University of Chicago, are absent from the United States on an official mission to Brazil, under the direction of the Office of the Coördinator of Inter-American Affairs. Professor White will return toward the end of December, but Mr. Reining will remain for some months longer.

At the University of Illinois, Dr. Herman G. James, son of former President Edmund J. James, and himself recently president of Ohio University, is serving as visiting lecturer and consultant on Latin American relations during the first semester of the current year.

Three promotions at the University of Illinois are reported, as follows: Dr. Clyde F. Snider from assistant professor to associate professor, and Drs. George Manner and M. Q. Sibley from instructor to associate.

Professor Pitman B. Potter, of Oberlin College, was a speaker at a joint meeting of the International Relations Clubs held at the University of Vermont during the first week of November.

Professor John W. Masland, who was in the State Department last year, has returned to Stanford University, where he is teaching in the Far Eastern Area and Language Program of the ASTP. He has been promoted to an associate professorship.

Professor Donald Webster, at present attorney for the OPA office in Seattle, while on leave from the political science department at the University of Washington, has accepted a commission as Captain in the U. S. Army and will report to the School of Military Government at Charlottesville in December.

At the University of Tennessee, Mr. Norman Wengert and Mr. James

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Ramey, both of TVA, and Professor William R. Blackard, of the College of Law, are teaching American government this year, and Dr. L. L. Durisch, Mr. Lyndon Abbott, and Mr. Arthur Jones, all of TVA, are conducting courses in public administration.

Dr. M. M. Chambers, now a captain in the Air Corps, U. S. Army, was transferred in August from station at Grand Rapids, Michigan, to Héadquarters Army Air Forces Central Technical Training Command, St. Louis, Mo., where he is chief of the Administrative History Branch.

Professor Graham H. Stuart is on sabbatical leave from Stanford University, and is in Washington, D. C., in the Department of State. Professor John Brown Mason, of Fresno State College, is offering courses at Stanford in the international field during Professor Stuart's absence.

Mr. Donald Price having joined the U. S. Navy, the managing editorship of the *Public Administration Review* has been taken over by Miss Laverne Burchfield, for several years associated with the Public Administration Clearing House in Chicago.

Professor Byron R. Abernathy, formerly of Texas Technological College, Lubbock, Texas, has been appointed wage stabilization director of the Eighth Regional War Labor Board, Dallas, Texas.

Professor John D. Lewis, on leave from Oberlin College, is living temporarily at Berkeley, California, where he is working on a book on recent and contemporary American political theory.

Professor L. V. Howard, on leave from the University of Maryland, is associated with the Historical Division of the Army Air Forces and is at present working in Washington.

Professor J. A. C. Grant has taken leave from the University of California at Los Angeles and is serving as vice-chairman of the Tenth Regional War Labor Board, with headquarters in San Francisco.

The Southern Institute of Local Government, sponsored by the University of Tennessee, met in Chattanooga on November 17. Speakers included Mr. Frederic Bass, of the American Public Works Association; Mr. Walter W. Heller, of the U. S. Treasury; Professor George S. Wehrwein, of the University of Wisconsin; and Mr. Carl McFarland, of Washington, D. C.

Dr. J. F. Isakoff, director of research for the Illinois Legislative Council, has waived his dependency deferment and entered the U. S. Army as a private. The Council declined to accept his resignation and granted him leave of absence for the duration. Dr. Karl A. Bosworth has been named acting director of research.

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Lieutenant Edward W. Carter, of the University of Pennsylvania, has been transferred to the Bureau of Naval Operations in Washington, D. C.

Professor John P. Horlacher, of the University of Pennsylvania, went on leave of absence on November 1 to take a position with the Philadelphia Regional Office of the War Labor Board.

Professor Lee S. Greene, of the University of Tennessee, has been named research consultant to the Tennessee Municipal League.

At Western Reserve University, Dr. Gerhard Krebs, formerly an instructor, has returned to the department of political science as an assistant professor.

Captain Albert Lepawsky, now on foreign service with the Army Air Corps, has been promoted to the rank of major.

Senator George W. Norris, of Nebraska, whose long and distinguished service in the United States Senate came to a close last year, has presented his papers to the Library of Congress. Over 100,000 items are included, comprising one of the largest and most important manuscript collections in the Library.

The National Tax Association held its thirty-sixth annual conference in Chicago November 20–22. Leading federal and state tax officials and representatives of taxpayers, universities, and civic organizations from all sections of the United States participated in the discussions, most of which were focused on postwar problems. Among the discussions of most general interest were those on postwar responsibilities of government and private enterprise; federal, state, and local postwar tax problems; public debt policy; intergovernmental fiscal relations; and coördination of income, death, and gift taxes. Professor Roy G. Blakey, of the University of Minnesota, and consultant to the Council of State Governments, was elected president for 1943–44.

Mr. Wilbur F. Murra, since January, 1940, executive secretary of the National Council for the Social Studies, resigned in September in order to accept a position as an associate editor with the Civic Education Service, publisher of weekly newspapers for elementary and secondary school pupils and for teachers of social studies in the secondary schools, with headquarters at 744 Jackson Place, Washington, D.C. Mr. Murra has been succeeded at the National Council for the Social Studies (which maintains headquarters in the National Education Association Building in Washington) by Mr. Merrill F. Hartshorn, formerly instructor in social science at Northland College, Ashland, Wisconsin.

Professor James L. McCamy, on leave from Bennington College, has been appointed executive director of the Bureau of Areas in the Foreign

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Economic Administration, which was created by a consolidation of the Office of Economic Warfare, the Office of Foreign Relief and Rehabilitation Operations, the Office of Lend-Lease Administration, and parts of the Office of Foreign Economic Coördination of the State Department. The Bureau of Areas will coördinate the development of area programs, work with the State Department in obtaining determinations of foreign policy, relate programs to military plans, and assist the Administrator in the direction of field operations.

Reprints (with covers) of the complete symposium on Problems of Postwar Reconstruction, published in the October, 1943, issue of the REVIEW, may be obtained at 25 cents each (plus postage) by applying to Kenneth Colegrove, 1822 Sheridan Road, Evanston, Ill.

MEMORIAL

Edward McChesney Sait, professor of political science at Pomona College, died on October 26, 1943. Although never fully recovered from a serious breakdown in health which he suffered some years ago, he kept courageously at his work and until only a day or two before his death was carrying the full burden of it. His career as a college teacher, in four institutions, covered a period of exactly forty years.

Born at Montreal in 1881, Sait received his bachelor's degree from the University of Toronto in 1902 and his M.A. there a year later. He was then appointed to a lectureship in history at the same institution, but in 1906 was given a fellowship at Columbia University, where he took his Ph.D. in 1911 and was appointed assistant professor of political science. In 1920, he was called to a professorship at the University of California, but fifteen years ago transferred his allegiance to Pomona College. There, in close association with the late Russell M. Story, he helped to gain for the department of political science at Pomona a place of real distinction. As a teacher, he was rated among the best in his profession, and his writings achieved a high standard, alike in substance and in style.

During the early stages of his career, Sait's interest lay chiefly in the political institutions of European countries. His book on *The Government and Politics of France*, written nearly a quarter of a century ago, disclosed a realistic grasp of the forces which were even then undermining the foundations of the Third Republic. But to present-day students of the science of government he became much better known through his notable volumes on *American Parties and Elections* and *Political Institutions*. In addition to these writings of his own, moreover, he edited with meticulous care a series of books by other authors, besides frequently making public addresses, attending conferences, and serving as a member of various civic committees. A man of sturdy frame and rugged physique during most of his active years, he was a prodigious worker who never spared himself or cast any portion of his responsibilities on other men's shoulders.

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Those who had the good fortune to know Sait with some degree of intimacy were invariably impressed by the range of his knowledge and the versatility of his interests. All through life he was a voracious reader, and his reading covered the four corners of the earth. The retentiveness of his memory was amazing, for he could recall at once and with unfailing accuracy almost any detail of political history. This rare facility enabled him to take his students far beyond the descriptive generalizations of their textbooks and encouraged them to seek an understanding of political relationships in the light of their historical evolution. Gifted as he was with a dependable sense of humor and an uncommon agility of wit, his classrooms were never dull; on the other hand, he did not suffer fools gladly, either inside the classroom or outside of it, and his rigid maintenance of academic standards became a Pomona tradition. By his students he was greatly beloved, for they saw in him a torch-bearer whose sincerity in the diffusion of light could never be questioned. And from the fraternity of political scientists he will be greatly missed.—WILLIAM B. MUNRO.

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BOOK REVIEWS AND NOTICES

Time for Change; A Proposal for a Second Constitutional Convention. By Alexander Hehmeyer. (New York: Farrar and Rinehart, Inc. 1943. Pp. xi, 211. $2.00.)

World War II has resulted in much study of postwar problems, not only in international, but also in domestic, affairs. Mr. Hehmeyer's book represents efforts in the latter field by one who has an adequate knowledge of our constitutional system, its defects, and the dangers and difficulties which confront attempts to reform it.

In Part One of his volume, the author meets the objection that the current period of great national stress is unsuitable for constitutional revision, by pointing out that constitutional change is inevitable under the pressure of new problems, and that if it does not occur through orderly processes, it will be provided by other and less satisfactory methods.

After a brief account of "The Background of Our Constitution," he discusses "The Amending Process Today." Recognizing the defects and difficulties inherent in the latter, he advances a unique suggestion for "A New Kind of Constitutional Convention," to be established by Congress for the purpose of studying the problems during the war and postwar periods and submitting to Congress its findings and recommendations. The latter could take the form of a draft revised Constitution or specific suggestions for amendments. Congress would then have full responsibility for submitting proposals through the regular amending procedure. Interesting details of a suggested plan for the composition of "The Second Constitutional Convention" are worked out.

Part Two, which embraces about three-fourths of the book, is devoted to "Suggested Reforms" which Mr. Hehmeyer believes the Convention should deal with. While he recognizes the important part that the Supreme Court has played and should continue to exercise in developing the Constitution, he emphasizes that this cannot be applied to those rigid features which require formal revision.

The author has written primarily in order to present a realistic picture of the problem for the layman, but his work is documented with a bibliography and a table of cases. He is convinced that the discussions and report of the Convention, if it were held, would arouse an informed public opinion that would influence and compel Congressional action on the recommendations. The chief hurdle, however, would occur at the outset, in overcoming the indifference and opposition in Congress to the calling of the Second Constitutional Convention.

While differences of opinion will naturally arise regarding some of the suggestions for reform, the book will furnish stimulating and suggestive reading for all students of our government.

ISIDOR LOEB.

Washington University.

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Review of Administrative Acts; A Comparative Study of the Doctrine of Separation of Powers and Judicial Review in France and the United States. By Armin Uhler. (Ann Arbor: The University of Michigan Press. Chicago: Callaghan and Company. 1942. Pp. xxxi, 207.)

The hustings have long resounded with discussion based on misinformation or no information about the differences between the American system of judicial control of administrative acts and the "dread" system of French *droit administratif*. The volume at hand does much to add valuable material to the thin trickle of fact and scholarly interpretation which has reached us in English concerning the important French developments of administrative law. Although the author is concerned primarily with the development of the "meandering course of the imaginary line of demarcation separating the spheres of administrative and judicial action in France" (p. 25), nevertheless the book gives much perspective in regard to developments of American as well as French administrative law. Indeed, it is too bad that the volume appeared as late as 1942, for if it had been available in 1936 it might have shed some bright and searching light on the uninformed darkness of confusion which reigned in much of the debate on the subsequent Logan-Walter bill.

Beginning with a trenchant analysis of the different conditions under which the doctrine of separation of powers developed in France and the United States, the author makes it clear that the basic considerations which led to the adoption of Montesquieu's theory looked toward the solution of widely different problems in the two countries. In France, the great concern was to keep the administrative independent of the judicial arm of government, while in the United States the emphasis was on the need for an independent judiciary as a check on the legislative bodies of the country. As a result, the French ordinary courts were denied power to interfere with administrative action, while the American judiciary in fact became supreme not only by its control of the legislatures but by its scrutiny of the acts of administrative agencies.

Powers so different in intent in the two countries have completed the circle and come together. In France, the intended strict differentiation of the administrative and judicial branches of government became so attenuated that gradually the ordinary courts began to return in certain senses to the adjudication of acts originating with administrative officials. In the United States, on the other hand, a watertight separation of powers proved to be impracticable, and so a situation was created analogous to that which the French arrangements had been instituted to combat. Neither the privileged position of the administration in France nor the power of the courts in the United States (privileged in point of fact) was able to withstand the pressure of social and political forces. The net result has been that the French courts have emerged with review powers similar

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if not equal to those of the courts in the United States, while in this country a marked tendency has developed to strengthen the final powers of decision of the administrative authorities and so lessen the control of the courts over them.

The author comes to the important conclusion which, although well known, needs constant reiteration, i.e., that the administration as well as the judiciary in the United States may well be a guardian of individual rights and liberties. Where safeguards are needed to preserve our constitutional form of government, they should first be provided in the administrative process itself. As the Supreme Court has said, "The courts are not charged with general guardianship against all potential mischief in the complicated tasks of government."[1] French experience throws new light on the American need for administrative safeguards, and the author has performed a valuable service in revealing that experience so clearly and so succinctly.

JANE PERRY CLARK CAREY.

Barnard College.

Government and Business Tomorrow. By DONALD R. RICHBERG. (New York: Harper and Brothers. 1943. Pp. vi, 194. $2.50.)

Government and Business Tomorrow is essentially a blue-print for business-labor relations in the United States during the coming years. It is a blue-print which the reviewer sincerely hopes will be widely read and heeded by both corporate managers and labor leaders. Certainly Donald Richberg has had adequate experience and ample opportunity on which to draw in writing this volume. Because of his wide and varied experience, he should have more appeal for captains of industry and leaders of labor than someone with an academic background.

It is evident that Mr. Richberg believes in the importance of retaining a system of private enterprise. His statement that despite inequities in distributing rewards, private enterprise has long ago demonstrated the tremendous productivity that results from maintaining individual freedom and the incentives of private gain is certainly not the assertion of one who wishes to destroy our present system. He points out that there is every reason for capital and management to coöperate in maintaining that productivity, no matter how much they may quarrel over sharing the gains.

The main purpose of the volume is to indicate where the foundations of a sound public policy should be laid. And the author declares that such policy must be grounded in a willingness to seek private gain through real public service, and that unless this is done, private enterprise cannot be

[1] Federal Communications Commission v. Pottsville Broadcasting Co., 60 Sup. Ct. 440 (1940).

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saved from increasing and destructive public controls. Industrial civilization has placed two new responsibilities on business management. One of these is the obligation to see that consumers who have become dependent on large business operations are regularly supplied with the necessities of life at reasonable cost. The other is the obligation to maintain a security of livelihood for workers who are dependent on business for the opportunity to earn a living.

Mr. Richberg's first five chapters—"The Coöperative Attitude," "A Brief Retrospect," "New Powers and Responsibilities," "Opportunities and Obligations," and "Rights and Obligations of Organized Labor"—are an able and convincing presentation and development of his fundamental thesis. Among other things, he not only challenges management to seek to coöperate with labor to establish self-government, but admonishes labor to do its part. He asserts that if labor destroys the ability of private management to maintain a competitive system, it will not be able to substitute labor management, but will make political management inevitable.

In the three middle chapters of his book—"The Consequences of the First World War," "Revolutionary Programs," and "What Are We Fighting For?," Mr. Richberg seems to digress somewhat from his principal thesis and discuss important but less germane topics. Certainly the subjects with which he deals in these chapters are related to his central thesis, but somehow to the reviewer they seem to be an interlude rather than an essential part. The book might have been more effective had Mr. Richberg included merely a few paragraphs on each of these topics instead of three chapters.

In his later chapters, such as "The Essentials of Free Enterprise," "Business Relations with Government," and "A Creed for American Business," the author returns again to his original thesis, and ably and effectively presents his conclusions.

FORD P. HALL.

Indiana University.

The Tennessee Valley Authority; A Case Study in the Economics of Multiple Purpose. BY JOSEPH SIRERA RANSMEIER. (Nashville: Vanderbilt University Press. 1942. Pp. xx, 486. $3.00.)

The place of this volume in the growing literature concerning the Tennessee Valley Authority is indicated by its sub-title, "A Case Study in the Economics of Multiple Purpose Stream Planning." Professor Pritchett's recent book enlarged on administrative aspects of the Authority, including personnel policies; the present volume opens with two chapters on the general evolution of national water resources policy, proceeds to consider in the third chapter the Tennessee Valley Authority Act of 1933

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and its amendments, summarizes next the general program, and concludes Part I with a chapter on "The Technical Aspects of the TVA Water Control and Wholesale Power Program." To the general student of government, a great virtue in the earlier chapters is the fact that the reader is shown the continuity and the roots and evolution of water resources policy in this country; already we are enabled through such a treatment to get away from the saint or devil theories of the TVA and President Roosevelt's share in it, and from the somewhat hasty attitudes we all shared ten years ago concerning a cataclysmic change, for good or ill, in American development, to the much-needed long view that characterizes the author's approach.

It is interesting to note that the research was done in part with the assistance of a field fellowship of the Social Science Research Council, a fellowship at the Brookings Institution, and grants-in-aid from the Vanderbilt University Institute for Research and Training in the Social Sciences; the obligation to undertake fair and yet not bloodless appraisals which such aid implies has been well met.

The second and most weighty (and difficult!) part of the book is Part II, in which the theories and problems of cost allocation are explored and discussed. The importance of the topic is not for students of public utilities alone, but is inherent in any consideration of multiple purpose programs, which have emerged as desirable in the treatment of river systems. Dr. Ransmeier explores the chief theories advanced, examines the experience of the TVA and the work of its chief advisers in this field (among them Drs. Bonbright, Glaeser, and Morehouse), and concludes that "in the end social considerations and public policy rather than hypothetical benefit valuations will be found to provide the more honest and satisfactory guides for public power planning." A final chapter is valuable for its outline of the needed changes in the planning of our water resources policies; it contains an argument also for decentralized administration of multiple purpose undertakings of this kind. Like Dr. Pritchett, Dr. Ransmeier is most favorably impressed with the record of the TVA as a regionally decentralized agency.

While the chapters of the book contain an analysis of a highly technical and difficult problem, the volume is valuable to the political scientist in relating a subject-matter problem to questions of law, organization, and administration generally.

JOHN M. GAUS.

University of Wisconsin.

Social Insurance and Allied Services. REPORT BY SIR WILLIAM BEVERIDGE. American Edition. (New York: The Macmillan Company. 1942. Pp. 300.)

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The Pillars of Security. By Sir William Beveridge. (New York: The Macmillan Company. 1943. Pp. 245.)

Seventh Annual Report of the Social Security Board. (Washington, D. C.: Government Printing Office. 1942. Pp. 81.)

National Resources Development. Report of the National Resources Planning Board for 1943. Part I, Post-War Planning and Program. Part II, Wartime Planning for War and Post-War. (Washington, D. C.: Government Printing Office. Pp. 81, 116.)

Security, Work, and Relief Policies. Report of the Committee on Long Range Work and Relief Policies to the National Resources Planning Board. (Washington, D. C.: Government Printing Office. 1942. Pp. 640.)

These publications, embodying or based on official reports in Great Britain and the United States, deal with important aspects of postwar planning and reconstruction. The main emphasis is on what is termed "social security," although that term may be used to include also other problems considered in Sir William Beveridge's essays and addresses on *The Pillars of Security*, and in the reports of the National Resources Planning Board.

President Roosevelt has stated the major aims of the war as to secure freedom from fear and want and freedom of expression and religion. Sir William names three main conditions of security after the war: justice in place of force as arbiter between nations; the organization of industry so as to provide a reasonable opportunity for work for all citizens; and assurance of an income for those who cannot work. In negative terms, he states the objectives as freedom from the giant evils of want, disease, ignorance, squalor, and idleness.

The British report on Social Insurance and Allied Services was the outcome of a comprehensive survey of existing schemes by an interdepartmental committee (set up on June 10, 1941) of 16 members from the civil service agencies concerned, including the Government Actuary, a representative from the Treasury, and Sir William H. Beveridge as chairman. This committee held 48 meetings; and received memoranda from 127 organizations, local officials, and private agencies, and also from government departments. The report was made by the chairman, so as to relieve the other members in the civil service from responsibility for the policies recommended.

The Beveridge report and most of the essays in *The Pillars of Security* have to do with measures for dealing with want and disease, by an expanded and unified system of social insurance based on a single contribution from each person, and uniform benefits (with one exception) for disability, old age, and unemployment, with new and additional benefits for

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occupational training, maternity, children's allowances, widowhood, and prenatal expenses. Retirement pensions will be conditional on retirement from work, and will apply to independent workers as well as to those employed by others.

The Report proper consists of six parts: introduction and summary; the principal changes proposed and the reasons for them; and three special problems, i.e., Social Security Budget, Plan for Social Security, and Social Security and Social Policy. Appendices include a memorandum by the Government Actuary, a "Survey of Existing Schemes," a list of organizations and individuals (other than government departments) submitting evidence, administrative costs, and some comparisons with other countries. Memoranda from organizations have been printed separately.

Special attention may be called to the careful estimates of the financial aspects of the proposals, in the memorandum by the Government Actuary and Part IV of the Report, on "The Social Security Budget."

As is indicated in the Report, it does not deal with all postwar problems. In the collection of papers in *The Pillars of Security*, Sir William gives some attention to the maintenance of employment and international relations. Other agencies are at work on these problems, as well as on education; but no comparable program to that on social insurance has as yet been presented.

The Beveridge report has been favorably received in most quarters, though subject to some criticism (e.g., in *The Quarterly Review*). In March the Government announced its acceptance in principle, but with reservations as to some proposals. After a three days' debate in the Commons, a Labor amendment expressing dissatisfaction with the Government's declaration was defeated (by a vote of 119 to 336), and a motion welcoming the Beveridge plan was adopted.

In the report of the Social Security Board for 1942, proposals are made for extending the social insurance and public assistance systems in the United States to wider segments of the population in respect to unemployment compensation, old age and survivors insurance, temporary disabilities, hospital benefits, and for general assistance. These do not go so far as the Beveridge Report.

In December, 1941, the National Resources Planning Board submitted to the President an extensive report of its Technical Committee on "Long Range Work and Relief Policies"; and in December, 1942, it presented its annual report for 1943 in two parts: I, on "Post-War Planning and Program," and II, on War Time Planning for War and Post-War." These are in some respects comparable to the Beveridge Report, but in addition to plans for social security, they discuss plans for education and employment.

Some similarities and differences between the British and American committees and their reports may be noted. The Technical Committee

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of the National Resources Planning Board consisted of nine members, six of whom had served in governmental positions, with two from university faculties and the executive director of the American Public Welfare Association. The American committee employed a technical staff of 25 persons, and received materials, memoranda, and other assistance from national, state, and municipal welfare agencies. No mention is made of materials from non-governmental agencies, as noted in the British report. The American committee had no member from the Treasury, and its report gives no detailed analysis of financial problems.

The report of the Technical Committee is about twice as long as the Beveridge Report, and is in four parts, dealing with: "The Evolution of Public Aid Programs," "Public Aid Problems and the People," "Financial and Economic Aspects of Public Aid Measures," and "The Administration of Public Aid," followed by a summary of recommendations. The latter includes a statement of objectives, financial and administrative principles, and more specific programs for work projects, social insurance, public assistance, and administrative arrangements.

Part I of the Report of the National Resources Board has four sections, dealing with plans for demobilization, for development of an expanding economy, for services and security, and for action by state and local governments and regions, with supporting technical material. Part II has four sections, dealing with: wartime planning for resources use; trends of planning for employment, prices, and production; progress of public works planning; and regional, state, and community wartime planning. These cover a vastly wider field than the Beveridge report, but the recommendations are in very general terms, emphasizing the need for specific programs rather than presenting a detailed series of such programs.

Plans for service and security recommend the development of social security legislation on lines similar to the proposals of the Social Security Board; but they also propose the expansion of education, health measures, and the underwriting of employment by the government.

Most attention is given to public works planning. A summary is given of postwar construction and improvement works planned by agencies of the national government, estimated to cost $7,695,369,606—of which about 35 per cent has been authorized by Congress. Eight states, 60 cities, and a few counties have formulated long-range programs of public works; and the preparation of such programs is under way in 14 other states and more than 20 cities.

Emphasis is laid on the need for coöperation of public and private agencies on construction programs, and for regional, state, and local, as well as national, planning. Little attention, however, is given to the problem of administrative organization and the integration of the different levels of public and private agencies.

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The American reports come from established agencies of the national government, but have not as yet received definite approval as outlining a governmental policy, comparable to the qualified endorsement of the British report by the Government and House of Commons. A bill has been introduced by Senator Wagner of New York to carry out the recommendations of the Social Security Board and some of the additional recommendations of the National Resources Planning Board on social security, which, however, do not go as far as does the program embraced in the Beveridge reports.

JOHN A. FAIRLIE.

University of Illinois.

The France of Tomorrow. By ALBERT GUÉRARD. (Cambridge: Harvard University Press. 1942. Pp. xxi, 287. $3.50.)

This volume is a curious *mélange* of excellent inter-war Franco-German history, contemporary political diagnosis, and utopian postwar prognosis. Labelled by its distinguished author "A Tract for the Times," it analyzes the moral, political, and social conditions which led to the collapse of the French Republic in 1940. The major responsibility for the disaster is assigned to the reactionary and nationalist bourgeoisie (less than 20 per cent of the population) which feared Léon Blum more than Hitler and took advantage of the military defeat to scrap the parliamentary system. According to Professor Guérard, the catastrophe was not due to any radical defect in the constitution of 1875, but to the fact that the Popular Front's offer of a "sacred union" was rejected by the Right when the nation's peril had become manifest. Short-sighted and incompetent general staff work, in which Pétain and Weygand as well as Gamelin were involved, contributed to the débâcle.

There is nothing particularly novel about this thesis. Indeed, the author himself has brilliantly expounded the theory of the "dictatorship" of the French middle class in some of his earlier writings. What will interest students of government in the present volume is that M. Guérard should now condemn parliamentarism in general. Far from being special to the French type, its faults, as he sees the problem, were "inherent" in the very nature of representative government. When threatened by totalitarian aggression, Britain was saved from the fatal defects of the system only because it happened to be an island! The cure for the political ills of France, therefore, lies not in the adoption of British (or even of American) methods, but in the establishment of a régime which will preserve political liberty "without a parliament" and provide governmental efficiency "without a dictator."

The institutional pattern of such a régime M. Guérard traces only in vague and abstract terms. It would be headed by an elected President

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endowed with full executive and legislative power, the exercise of which would be tempered, presumably, by compulsory consultation with disinterested experts. A "College of Tribunes" would apparently act as the vigilant defender of "the people's rights." When, in the opinion of the Tribunes, the President misinterpreted the desires of the nation, they would order a national referendum on the issue. Since political "parties are dead," and "the basic reality of politics is no longer the party, but the pressure group, the lobby," M. Guérard prefers to entrust the liberties of the people to an all-powerful executive and a professional bureaucracy. "The Vichy régime," in his opinion, "is anti-democratic, not because it has done away with Parliament, but because it stifles every form of free expression."

How, in the light of modern experience, and in France of all places, any such system could escape degenerating either into a Caesarian dictatorship or into an irresponsible government by bureaucrats, is beyond this reviewer's comprehension. Yet M. Guérard honestly regards it as the only path which will ensure both effective government and civil liberty.

But it is with "The Europe of Tomorrow" that his book is primarily concerned. Indeed, he thinks that the only hope for liberated France is to "abdicate her privileges and relinquish her responsibilities as a "Great Power," by losing her political identity in an integrated European organization, while retaining her distinctive cultural traditions. Here the political realist will find utopia unrestrained—a picture, not of a federation of European states, but of a unitary international system, in which all races, creeds, nationalities, and languages will be assured equality; in which liberty of thought and expression will prevail everywhere; in which a single currency, free trade, unrestricted internal migration, and a common auxiliary tongue will obliterate national frontiers; in which uniform social legislation will level upward the living conditions of all its citizens. Not only France, but Germany and Italy, would disappear as administrative entities; for M. Guérard envisages the decentralization of the national governmental structure of all the great Continental powers. How Britain and Russia would fit into the scheme, the reader is left to imagine. But with nationalism thus divorced from territorial and economic administration, the contention is that the peace of Europe would be assured.

Strange as it may seem, the new European dispensation would be inaugurated, not by "a peace conference," but by "a constituent assembly." Even to M. Guérard, representative government appears to be a *pis aller* after all—at any rate for international purposes. Or perhaps he expects the inaugural assembly to abdicate to some all-European, all-powerful executive authority, flanked by an international civil service but minus any representative institutions.

Notwithstanding all this confusion of thought and naïveté of political

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analysis, *The France of Tomorrow* is a charmingly written volume, replete with erudition. If only to refute some of the solutions it proposes, the student of contemporary politics will find it worthy of more than passing notice.

WALTER R. SHARP.

College of the City of New York.

Towards An Abiding Peace. By R. M. MACIVER. (New York: The Macmillan Company. 1943. Pp. 195. $2.50.)

Everybody, or almost everybody, wants an abiding peace after this war, and many books have been written on the problem of how to get such a peace. This book, by the well-known Columbia sociologist, is among the very good ones—it is simply written, brief and to the point, thoughtful and thought-provoking, idealistic and realistic (if those terms make sense and are distinguishable)at the same time. In thirteen short chapters, Professor MacIver discusses the nature of war and the price of its elimination; the terms of peace and the procedure of their making; the basic principles of world order and the actual framework and machinery of an international organization; and the particular question of how to secure the effective participation of the United States, this being, of course, the most uncertain element and therefore the crux of the problem of an abiding peace. Not everybody will agree with MacIver's analysis or conclusions—there is, in the opinion of this reviewer, ground for disagreement on many points—but he does make a careful, hard-headed, unsentimental analysis which is well worth the attention of anyone interested in the problem of war or peace.

In the first place, MacIver vigorously challenges two propositions, widely believed and subbornly reaffirmed, which relate to the possibility of an abiding peace: (1) that human beings have always fought and we cannot change human nature; (2) that we must do away with the causes of war (that is, create a virtually perfect world) before we can hope to do away with war itself. He shows up the false statistical reasoning upon which the first proposition is based (that great countries have been longer at war than at peace) by pointing out that it could similarly have been proved two hundred years ago that most human beings would always live under rural conditions, one hundred years ago that life expectancy would never exceed forty years, and fifty years ago that man would never fly. There is progress, after all, and "the mechanical counting of past occurrences will never yield us the secrets of the future." With respect to the second proposition, he notes the fallacy of confusing causes of disputes with causes of war, and points out that in our domestic order we have by no means eliminated either disputes or causes of disputes, but have been able nevertheless to maintain peace because we have organized our

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society, that wars continue internationally merely "because human organizing abilities have stopped at the line where states have their boundaries." The price of international peace is, in his opinion, a two-fold price, a psychological price, by which is meant a reformation in the attitudes of men towards the problem, and a political price, by which is meant, to put MacIver's view most summarily, giving up the nonsense of sovereignty and instead submitting to a system of law and government.

MacIver's world order would be based on international law with force behind it, an international police, and the eventual disarmament of individual nations; its structure would in several respects be similar to that of the League of Nations (he expressly rejects Clarence Streit's Federal Union), but a League strengthened by substitution of the majority for the unanimity principle (although retaining the principle of equality of states), by somewhat clearer executive functions, by armed force at its command, and presumably by the membership of the United States. To some extent, the detailed proposals seem to reflect a lack of familiarity with the actual operation of the League of Nations. One could not observe the League Assembly in action over a period of twenty years, and still describe it as "unwieldy, lacking in initiative, inefficacious" without, at any rate, some qualification as to time and circumstance. The mandate system is discussed in some pages with the cynicism of our sourest historians, as though it provided actually an extension of imperialism instead of a very decided modification and improvement; and there is glaring inaccuracy in the statement that "the United States remained aloof from this latest development of empire [the mandate system]." Surely the author knows about the ten mandates treaties entered into by the United States during the pre-New Deal years, and his special attention may be directed to the State Department publication entitled "Mandate for Palestine" (1927), with its extremely interesting argument (which we won) for the legal interest of the United States in the Near East mandates even though we had no part in the war against, or the peace with, Turkey. Aloof indeed!

Some of MacIver's proposals seem quite unworkable and even fantastic, such as the suggestion that in the International Executive or Cabinet, India should regularly have one member (as also the United States and Russia), while Great Britain and the Dominions should together constitute a "state-group" and have one member.

There are other points, such as a "soft peace" for Germany and other of the specific territorial and economic terms of peace, with which vigorous difference of opinion may be registered. But the book as a whole is a cool and stimulating analysis of the conditions of an abiding peace, with specific suggestions that should afford plenty of ground for study and thought, if not for complete agreement.

CLARENCE A. BERDAHL.

University of Illinois.

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Geopolitics; The Struggle for Space and Power. By Robert Strausz-Haupé. (New York: G. P. Putnam's Sons. 1942. Pp. xiii, 274. $2.75.)

This volume presents a clear and arresting account of the growth and significance of German *Geopolitik*. In the opinion of the author, *Geopolitik* (as distinguished from the objective study of political and strategic geography) is not a "theory of power politics, or even of *Realpolitik*" in the nineteenth-century sense. *Geopolitik* is a theory of state growth and of the relations of nations built upon the belief that politically dominated space is power. Absorption of space, according to German geopolitical thought, generates power to conquer more space. International relations become an "everlasting struggle" leading ultimately to world-empire by one state.

The origins of *Geopolitik*, Dr. Strausz-Haupé emphasizes, are found in the eminently respectable field of political geography. The German idea of "space as a prerequisite of national greatness" originated with Friedrich List, who visited the United States in 1825 and was much impressed with the "vision of a vigorous nation possessed of vast space." Later German geographers continued to emphasize the importance of space to state life. The general study of geographical influences upon political life eventually acquired the name of *Geopolitik* and became "the crucible into which expansionist aspirations" were "poured." "Under political pressure, *Geopolitik* slipped, one by one, the moorings which had held it to the firm ground of political geography and drifted into the shifting currents of Nazi propaganda."

The ideological antecedents of *Geopolitik* were not all native to German soil. The Monroe Doctrine, for instance, misconceived to be a policy of territorial expansion, "influenced profoundly a long line of European theorists." General Haushofer, the dominating figure in German geopolitical thought, borrowed from the British geographer, Sir Halford Mackinder, the latter's view of world policy as a continuing struggle between "oceanic" and "continental" peoples in which supremacy would be achieved ultimately by the people of the great Euro-Asiatic "heart-land." The German nation, Haushofer contended, growing in power by its expansions into space, must eventually control this heart-land.

Haushofer also derived many of his ideas from a critical analysis of the American Admiral Mahan's expansionist doctrines of sea power. Indeed, the influence of Mahan is "clearly noticeable throughout Haushofer's teachings—in spite of, or perhaps because of, the fact that Haushofer's own doctrine of land power is the most extreme negation of Mahan's theories."

Dr. Strausz-Haupé succeeds remarkably well in selecting the central themes from Haushofer's "elusive" and unsystematic "theorizing" and in making them intelligible to the non-German mind. His well-written

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text, with careful though not extensive documentation and a good index, is as interesting to the general reader as it is useful for the professional political scientist. It should be given high priority in the reading of students of political theory and international politics.

MARGARET SPROUT.

Princeton, N. J.

The New Europe. By BERNARD NEWMAN. (New York: The Macmillan Company. 1943. Pp. 568. $3.75.)

While written before Pearl Harbor, and published in Britain in 1942, this eminently readable study of European frontiers by a principal lecturer of the British Ministry of Information remains highly pertinent today. Mr. Newman is sympathetic toward a "new Europe" which may be constituted of half a dozen federations; but he does not expect it soon. Federation or no, frontiers will be important—as in the scrambles after 1918. As one illustration, Newman states that "Rumania and Hungary will be at one another's throats on the question of Transylvania the moment Germany is defeated, unless we are ready with some scheme," at least a stop-gap (p. 54).

Although holding that future European frontiers will not differ radically from those of 1938, the author makes a good case for transferring across borders some seven million people. He points to the good results of the Greek-Turk exchange, despite the quite unnecessary brusqueness of its execution. A few millions may have to suffer uprooting for the sake of the improved peace prospects for hundreds of millions (p. 24). As to the expense involved, he thinks that it would be "worth the cost of a week's war." The plebiscite is regarded as useful in some cases, but not as a panacea.

After analyzing the bearing of the Atlantic Charter on frontier questions, Newman examines the problems of fifteen countries in the triangle, Finland-Bulgaria-France. The author does not pose as an "expert" on all the thirty-odd border areas he discusses; but he illuminates each by sketching the historical setting and his own on-the-scene impressions. Over a fifth of these pages are devoted to Poland, whose claims to the Corridor, Danzig, and East Prussia are considered very sympathetically.

Perhaps most interesting among the individual discussions are those involving Russia. Is it significant that in August, 1943, a staff member of the British Ministry of Information (although presenting the usual disclaimer on the fly-leaf) presumed that the Baltic States would regain their independence? Newman points to the choiceless character of the wartime "plebiscites" in the areas occupied by the Soviet Union in 1940, and to Russia's signature of the Atlantic Charter, as reasons for anticipating a re-appraisal of those frontiers. "History is likely to judge the new peace treaties by the treatment meted out to small states" (p. 211).

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Concerning Balkan frontiers, considerable optimism is expressed, especially in the case of Bulgaria's borders with Rumania and Yugoslavia. Transylvania seems soluble only by large-scale transfer of population. As a haven for uprooted Jews, a Soviet Bessarabia is thought more feasible than Libya or East Prussia.

Some fifty maps (chiefly ethnographic) and a good index make this book also worth referring to when United Nations troops enter a new area, or when diplomats confer about a postwar frontier. Unless these statesmen "are backed up by a soundly informed public opinion, the treaties they sign are not likely to be more permanent than those signed in 1919" (p. 55). The book promotes such opinion.

H. SCHUYLER FOSTER, JR.

Washington, D. C.

The Legacy of Nazism. By FRANK MUNK. (New York: The Macmillan Company. 1943. Pp. xvi, 228. $2.50.)

The course of the war brings closer the problems of Europe's rehabilitation and reconstruction, making it more and more important to know what the situation of European countries at the close of the war is likely to be, and what will be the scope and nature of the tasks ahead. Dr. Munk's book is intended to provide an answer to these questions. The author deals with many aspects of the German economy in Europe, and with its impact upon the industry, agriculture, finances, and population of that country.

Had the author concentrated on these problems and gone as deeply as possible into the details of available information, he would have produced a very important and valuable book. Unfortunately, Dr. Munk extended his subject-matter so as to include a good deal of material on the origins and development of totalitarian economics, and numerous critical comments, superficial, but wordy, on liberal capitalism and pre-Keynesian economics. He also devotes a good deal of space to social forecasting. His book has thus gained in breadth, but has considerably lost in depth. It may have become more interesting to the "lay reader," who should beware, however, of many of the author's broad generalizations and scintilating generalities; for the professional reader, the book, as it stands, is considerably less useful than it might have been if the author had taken its title more literally.

The book is at its best when it provides factual information, but in that respect it is on the whole disappointing. Considerably more material could be collected at this time about economic conditions inside Germany and inside the occupied countries of Europe, about the industrial reorganization of Europe under Germany's management, about the extent of destruction from the air, etc. There are a good many facts scattered around which it would have been a useful service to bring together in

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one volume. Instead, much of the material presented by Dr. Munk is simply a compilation and rehash of other recent publications.

When dealing with the future, Dr. Munk's book is even less satisfying. The future rôle of America and England on the one side, and Russia on the other, in liquidating the "Legacy," is left out of account. Instead, on several occasions the author holds funeral services for the Europe-that-was and its economic and social institutions. To say that the past is past, and that the future will in many ways be different from it is so self-evident as to require no emphasis. Nor does one contribute anything to our understanding of the problems ahead by forcefully stating that "Change marches on." On the other hand, if Dr. Munk means that the bourgeois society of Europe and its liberal capitalism are dead and should be forgotten, this cannot be considered more than the expression of personal opinions, and, presumably, of personal preferences, of the author. There is no indication that economic collectivism is what the liberated peoples of Europe will wish to live under. Indeed, it is hard to say at this time what Europeans will wish to have as their economic and social order, and the answer may differ widely from one country to another. Nor is it possible, in discussing the future of Europe's economic organization, to disregard the impact that may be exercised by British, American, or Russian influences. Fortunately, it is not necessary at this stage that we should look upon Europe's future in a spirit of prophecy. All we want now is the facts of the European situation as far as they can be collected, and a conception of the sort of world in which we wish to live. The latter, of course, would exceed the scope of Dr. Munk's book.

Like other adherents of social collectivism, Dr. Munk would maintain certain parts of the "Nazi Legacy" which many others would rather wish to see promptly liquidated. The following views, e.g., are, to say the least, bewildering: "A major revolution in economic control has already taken place. All that remains to do is to take stock of what has happened and carry it to its logical conclusion." Even though the Nazi institutions have "perpetrated every conceivable crime," the United Nations should not be deterred "from utilizing both economic units and political institutions set up by Germany whenever and wherever it may seem expedient" (pp. 261–262). What are to be the criteria of expediency? In another context, but in the same vein, Dr. Munk writes: "It may well be that this policy of ruthless confiscation will have far-reaching effects on the institution of property. The abandonment of the principles of sanctity of contract and inviolability of property without due process of law, . . . may prove to be a heavy blow to the traditional concepts of property and ownership" (p. 133).

Whatever its other merits and demerits, Dr. Munk's book provides an idea of the complexity of problems which will have to be faced in recon-

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structing Europe after the war. For that reason, whether or not one agrees with the main drift of the author's argument, the book deserves careful reading. There is much scope, however, for another treatment of the subject, better documented, and less subjective.

MICHAEL A. HEILPERIN.

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The Middle East: Crossroads of History. By ELISHU BEN-HORIN. (New York: W. W. Norton and Company. 1943. Pp. 248. $3.00.)

It is deplorable that so little objective writing is done on the Near East; a large proportion of the material presents a case for some country or faction. This interestingly written volume, apparently so plausible, is written with a bias in favor of a Jewish state in Palestine. Turkey is presented in a most favorable light. On the contrary, practically nothing good is said for the Arabs and the British. Pan-Arabism and Pan-Islamism are dismissed as myths.

With the first part of the author's thesis, regarding the historical and current importance of the Near East, few would disagree. Most people would also concede that sources of friction in this important area must be kept at a minimum for the sake of general peace. The proposed solution, however, is most questionable.

The author proposes that all the Arabs in Palestine and Transjordan be transferred to Syria and Iraq, and that Palestine and Transjordan then be made an exclusively Jewish state. He says that this will be easy in both cases, as the Syria-Iraq territory can hold thirty-five million people (p. 224), and that three million refugees can be settled in Palestine in addition to the half-million or so Jews now living there (p. 233).

The area of Iraq is about 160,000 square miles. The author does not mention that two-thirds of this is desert and grazing land, and that only about ten per cent is cultivated. Syria and the Lebanon are considered as having 56,000 square miles; it is not mentioned that less than five per cent of this is cultivated. The total area is about eighty per cent that of Texas, and there is less rainfall; yet it is stated that thirty-five million people can live there.

Similarly, the author advocates raising the total population of Palestine and Transjordan from less than two million to 3,500,000. He does not admit, however, that the cultivable land is largely under cultivation now, and that both countries already verge on being overpopulated.

For both Syria-Lebanon and Palestine-Transjordan, the author suggests a kind of condominium-mandate, supervision by two or more powers—for the first, because not capable of self-rule, and for the latter, because certain assistance will be necessary in the rehabilitation program.

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That kind of supervision might work, although such divided responsibility has rarely functioned well. And assistance will assuredly be needed in large measure if the requirements to date of about $1,000 per person for settling immigrants in Palestine are maintained.

Finally, the author suggests a smaller sovereign state within Palestine to include the Holy Places (p. 235). It would be placed under a Christian-Jewish-Moslem commission. One guess as to whether such a plan would increase or decrease friction in the area is as good as another.

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BRIEFER NOTICES

AMERICAN GOVERNMENT AND POLITICS

Wartime Problems of State and Local Finance (Philadelphia: The Tax Institute, pp. 277, $2.50) consists of seventeen articles by fiscal specialists and an appendix containing the reports of regional round-tables sponsored by the Tax Institute. Topics discussed by the contributors are: the effect of the war on state and local government costs and revenues; intergovernmental fiscal problems; state and local responsibility in winning the war; and shaping fiscal policies to aid in postwar adjustment. State and local treasuries have generally shared in the increase in national income. Individual and corporate income taxes, taxes on tobacco and liquor, taxes on intangibles and general property, have responded to the stimulus of expanded purchasing power. The lucrative gasoline tax has been a war casualty. Federal aid is holding up. Optimism over a full treasury is tempered by a note of concern lest the national debt and the federal government's tax program decrease federal aid and curtail state and local revenues. Some of the costs of state and local governments have declined. Expenditures for capital outlay can be reduced or held in reserve until after the war. State and municipal governments have had to find ways of getting along on reduced personnel. On the other hand, high living costs must be compensated by increasing expenditures for payrolls and supplies. Expenditures for some state and local functions must be maintained at the present level, if not increased. Public health, public assistance, and educational costs, for example, cannot be easily reduced. The war has complicated the problem of intergovernmental tax exemption, inasmuch as a considerable portion of the properties and facilities taken over by the government will be exempt from state and local property taxes. It is the view of Charles S. Rhyne that the best solution for this problem is payments in lieu of taxes. Paul Studensky makes a strong case for removing the exemption of state and municipal bonds from federal

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income taxation. The exemption is bad because it deprives the federal government of revenue, and it affords a means for wealthy taxpayers to evade their tax obligations. These losses exceed any good that the states and municipalities may get out of the exemption. The theme dominating the discussion is that now is the time to improve governmental structure and practice; reclassify jobs and overhaul civil service systems; pay off public debts; maintain tax rates; restrict non-essential spending; and put the surplus in a reserve. The contributors to the symposium do not stray from the main topic of wartime problems of state and local finance. While the usual limitations of a symposium prevent a deep probing of the problems, the volume does contribute some worth-while suggestions to state and local fiscal officers for planning and acting now to meet postwar adjustments.—JAMES E. PATE.

The title of *The Legislature of California; Its Membership, Procedure, and Work* by no means indicates the extent to which this volume of 250 pages is a compendium of most of the material which has been written concerning the legislatures of all states in recent years. Published by the Commonwealth Club of California in January, 1943, the study was under the supervision of C. C. Young as director, whose extensive state legislative experience includes not only the governorship of California for four years (1927–30) but also six years as speaker of the Assembly and eight years as lieutenant-governor and president of the senate. However, the director does not try to weave into the findings any personal history of his experience. Rather, the study is a careful research compilation prepared by Arthur Harris and Winifred Cobbledick as research assistants. Consideration of the legislative process is divided into ten major chapters with obvious headings—legislative reapportionment, sessions, salaries, bills, committees, legislative aids, lobbying, etc. In each chapter there is usually a recurring pattern of sub-heads, under each of which a careful summary is given of the various studies which have been made in various states on the particular topic. This is followed or preceded by material dealing specifically with California. In all, there are 78 major tables and numerous minor tabulations, many of which deal with the situation over the country. Much of this material has been available before, but in widely scattered articles and pamphlets. Brought together in the present form, it gives perspective to consideration of the California situation, while at the same time it makes the volume of much greater interest to the student of legislation in other states. Also as a result of the method pursued, the footnotes and the references at the end of each topic constitute an elaborate bibliography of the entire field. California experience is given careful study. For example, there is an intensive analysis of the progress of bills and of the "closing rush." Readers will be interested in topics not common

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to many other states, "double filing" in the primary, successfully used by senators, the bifurcated session, and the controversy concerning interim committees, settled by constitutional amendment adopted in 1940. The writers do not attempt to reach conclusions or recommend changes, but present, as a factual study, a comprehensive background for the consideration of problems of legislative organization and procedure.—FREDERIC H. GUILD.

Matthew Page Andrews, in his *The Soul of a Nation; The Founding of Virginia and the Projection of New England* (Charles Scribner's Sons, pp. xi, 378, $3.50) takes issue with historians who stress economic factors behind the foundation and early development of Virginia. Venturers to the East were interested solely in profits, but the men who began and maintained settlements in the Western Hemisphere placed ahead of material gain such idealistic motives as extension of the English state and church, conversion of the natives, and spread of representative government. According to the author, chief credit for the liberal policies of the Virginia-London Company belongs to Sir Edwin Sandys, whom he calls the founder-in-chief of representative government in America. By the time James I and the conservative, profit-seeking Smith-Warwick faction of the Company brought the colony under royal control in 1624, the liberal statesmen headed by the Sandys-Southampton group had laid a firm foundation for "the soul of the nation." Although Mr. Andrews has gathered much interesting and valuable material, some skeptics will question the validity of his thesis. For one thing, he has apparently accepted without question the motives as set forth by the promoters themselves. Furthermore, one should remember that Sandys was an influential figure in the Company during the period of autocratic rule in the colony, and that representative government came to Virginia at a time when Smith, not Sandys, headed the Company. There is also the possibility that conditions in America had some significance. Could it have been that the promoters of Virginia, having failed to make the venture a profitable commercial affair, had to turn to colonization and more liberal policies if they were to expect any return on their investment?—ROBERT E. BROWN.

Not the least important of peace and postwar problems will be that of minorities; so an examination of the status of an American minority group certainly is in order at this time. *The North American Indian Today* (University of Toronto Press, pp. xi, 361, $3.00), edited by the late C. T. Loram and T. F. McIlwraith, makes such a contribution. It is a collection of papers presented at a seminar-conference in 1939 conducted by the University of Toronto and Yale University. Indians, anthropologists, sociologists, government officials, missionaries, and traders attended. It

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was the fifth of a series sponsored by the Carnegie Corporation and conducted by the Department of Race Relations at Yale, either alone or in coöperation with some other university. The papers are arranged logically under headings denoting the types of problems examined, Canadian and American papers being alternated; and explanatory introductions have been presented for some sections. Governmental, economic, social, racial, and religious problems of the Indian are examined in detail. Emphasis is given to the fact that the American Indians do not constitute a typical minority group, in that they have been accepted by government definitely as national responsibilities. Also recognized is that in the end the civilization of the white man must prevail over that of the Indian, leaving only the problem of how fast the latter should be changed or eliminated. The contributors seem agreed that it ought to be a slow process in order to cause as little disturbance and suffering as possible, and with the possibility of incorporating some things into the white man's civilization. Only joint participation by the two races in a search for solutions to these various problems can prove satisfactory, according to the valedictory paper. Unless the Indians provide more leadership than in the past, only complete absorption can result. An excellent job of arranging and editing has been done. The papers have been written by individuals whose training, occupational experiences, and present positions qualify them to speak authoritatively. In the one volume is contained a wealth of information on the past, present, and future of the American Indian problem. All interested in this problem should be grateful.—CHRISTIAN L. LARSEN.

Inflation in the economic world, like a tornado in the physical world, challenges analysis, and while both phenomena have been well described, nothing very effective has been done about either. Recently, however, economists, recognizing the inflationary effects of war, have sought means to keep rising income in equilibrium with proper expenditure. Under the auspices of the Carnegie Corporation and the Institute of Public Administration, three specialists in public finance have spent two years exploring the mysterious realm of price controls, consorting with the inflationary gap, and calling ready purchase money and goods ready for sale by their nicknames (rpm and grs). The product is a very technical book about *Taxing to Prevent Inflation* (Columbia University Press, pp. xii, 236, $2.75). Preliminary to the study, Milton Friedman appraised various methods of predicting the onset of inflation (Part III). With this as a foundation, he and Ruth P. Mack proceeded to develop techniques for analyzing and anticipating change in national income (Part IV) and for estimating the amount of taxation necessary to avert inflation (Part I). Though tentative and experimental, these techniques ought to be very helpful to treasury experts. The calculations are so complicated, however,

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that most taxpayers and members of the ways and means committee will have to accept the conclusions on faith. The authors do not claim to have found a dependable answer, but their approach is much better than intuition and political expediency. More comprehensible is Carl Shoup's analysis of the relative advantages and availability of various types of income and sales taxes in controlling inflation (Part II). This concise and objective summary is a valuable guide through the maze of debate on wartime tax bills.—JOHN ELY BRIGGS.

The Committee on Minor Judiciary of the Pennsylvania Bar Association and the Institute of Local Government of Pennsylvania State College have coöperatively made one of the best of several recent studies of state justice of the peace (and alderman) court systems under the title, *Survey of the Minor Judiciary in Pennsylvania* (Pennsylvania Municipal Publications Service, State College, pp. 226). The group is somewhat mild in its textual criticism of the justice and alderman courts, but the extensive data presented may very well arouse suspicion in the reader's mind, if not indeed convince him, that all is not well with the system. Pertinent comments are made on such subjects (usually chapter titles) as the history of the justice of the peace, personnel of the Pennsylvania system, public costs of justices, and the work and the fiscal control of justices. A review of studies in other states is made, and proposals are advanced for the reform of the minor court system in Pennsylvania. The degree of reliance upon statistical and tabular data is indicated by the fact that in the text and appendix are included 98 tables, two graphs, and a spot map. This volume is a valuable addition to the literature of the minor courts. A significant feature is a bibliography containing 86 separate titles of books and articles relating to this field of administration.—PRESSLY S. SIKES.

The May, 1943, number of *The Annals of the American Academy of Political and Social Science* (pp. 1–157, $2.00) is devoted to a detailed analysis of the broad subject, "Our Servicemen and Economic Security." The material is presented in a series of twenty-one articles by twenty experts in the field, each dealing with a more or less distinct phase of the larger problem. The treatment covers such major sub-heads as (a) allowances for dependents, (b) civil liabilities, (c) insurance, (d) re-employment, (e) government aid, and (f) women in service. Each article is a scholarly analysis of a distinct phase of the larger subject; and all combined give a comprehensive picture of the whole. The information supplied is of particular importance to the men and women in the armed forces and to their dependents. A serious attempt has been made to integrate the materials presented in the various articles so as to produce a well organized whole. The method of treatment, however, is such as to make complete integration of the materials presented difficult, if not

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actually to preclude the attainment of such a goal. Some one familiar with the general field could present the information here supplied in such a way as to provide a more unified analysis of the entire subject.—DANIEL B. CARROLL.

The Supplement to the 1938 *Check List of Legislative Journals of States of the United States* (pp. 107), which has recently been issued in Boston by the National Association of State Libraries, is the outgrowth of a legislative journal's microfilm project, a coöperative undertaking of the Library of Congress and the University of North Carolina. William S. Jenkins, then of the department of political science of the University of North Carolina, in charge of the project, made a nation-wide search to bring together a complete file of the records of American legislative bodies —state, territorial, and colonial—whether printed or manuscript. It is interesting to note that there are now relatively few gaps in the records of American legislative bodies. In several instances, the only known copies of certain pre-Civil War Alabama journals are in the British Museum. For certain Louisiana Confederate journals, for which no manuscript or newspaper accounts exist, the only known copies are in private hands. At the Library of Congress, there is now available for the first time in one place (in either printed or microfilm form) copies of almost all the journals in the original check-list and the supplement. Lieut. William S. Jenkins, USNR, in the course of his work on the project and the supplement, has prepared a checklist of state-collected documents, and it is to be hoped that the National Association of State Libraries will be able likewise to make this available in printed form.—J. B. CHILDS.

The steadily increasing number of persons entering the military service of the United States adds to the timeliness of Lee S. Tillotson's *The Articles of War Annotated* (Military Service Publishing Co., pp. xix, 291, $2.50). Following the organization usually employed in books of this type, notes by the author are made after each Article. These notes consist of a selection of the most pertinent materials found in the different Digests of Opinions of the Judge Advocate General of the Army, the Manual for Courts-Martial, and the Military Laws of the United States. At the end of the volume, supplementary annotations for the year 1942 are added. Notes are divided into sub-heads, and citations are many, with cross-references to other Articles and to other notes. With respect to civilians, notes are included that concern civilians in general, in the field, between armistice and declaration of peace, and prisoners of war and interned enemy aliens. Interesting also to the civilian is the note concerning the trial of civilian spies by military law. The volume should be particularly valuable to persons interested in military law who do not have access to the Digests and other material.—ROBERT S. RANKIN.

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Among individuals who half a century ago shot poignant missiles at the spoils system and generated enthusiasm for civil service reform (but while in office did amazingly little to put his preachings into practice), was the wealthy-by-inheritance American scion of the Bonaparte family, Charles J. Bonaparte, close friend of Theodore Roosevelt and at various times special investigator of official corruption, Secretary of the Navy, and "trust-busting" Attorney-General—a Roosevelt Progressive who never lost his patrician philosophy and remained "a moralist favoring an aristocracy for the good of the democracy." *Charles J. Bonaparte, Patrician Reformer—His Earlier Career* (Johns Hopkins Press, pp. 150), by Eric F. Goldman, is an informative, well-documented, factual rather than interpretative, study of the reform activities of this aristocrat up to the time of his appointment as Attorney-General. The author undertook the study, in part at least, to add needed emphasis to the fact that not all "reformers" are plebeians, even in America.—ARNOLD J. LIEN.

In *Administrative Districts and Field Offices of the Minnesota State Government* (University of Minnesota Press, pp. xiv, 143), Ivan Hinderaker describes in clear text and excellent charts the central and field organization of each state department discharging field functions in Minnesota. Hinderaker makes no attempt at critical analysis of the administrative decentralization process in general, but his brief conclusion contains (1) an outline of the ten types of field organization now used in Minnesota, and (2) suggestions for increasing the effectiveness of state field services by the unification of district boundaries, the creation of joint field offices, and the consolidation of non-technical inspection services. Inasmuch as there are significant advantages in frequent contacts between public officials and private citizens, the practice of administrative decentralization becomes increasingly important as the states assume more and more hitherto local functions. Unfortunately, there is almost no material available on actual state practices in decentralizing administration. Hinderaker's study eliminates that lack for one state at least, and should therefore be useful to state administrative officials and students of public administration alike. Moreover, its clear organization and presentation might well set a pattern for similar studies in other states.—L. H. ADOLFSON.

FOREIGN AND COMPARATIVE GOVERNMENT

Journalists, columnists, and radio commentators have in recent years established a practical monopoly on the book market for headliners dealing with contemporary political events. This has, in many instances, made for exciting reading, but not always for sound analysis and for balanced historical judgment. Herbert L. Matthews' *The Fruits of Fascism* (Harcourt, Brace, pp. 341, $3.00) is a rather exceptional book inasmuch as the

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writer gives not only a vivid account of events during the past twenty years in Italy, many of which he witnessed personally as the *New York Times* correspondent in Rome, but also in that he attempts—in the opinion of this reviewer quite successfully—an analysis of the conditions and forces, both economic and psychological, which brought about the Fascist régime and kept it going for two decades. To a convinced Marxist, as well as to a mind trained in Spengler's philosophy, Matthews' book may leave many things unanswered and unexplained. But it constitutes undoubtedly an attempt at analysis, both sound and honest, and cleverly presented. The author has the courage to state in his introduction: "I, too, was an enthusiastic admirer of Fascism once," and in passing judgment on his "hero," Mussolini, Matthews cites Gibbons' words about Cola di Rienzi: "Posterity will compare the virtues and failings of this extraordinary man; but in a long period of anarchy and servitude the name of Rienzi has often been celebrated as the deliverer of his country, and as the last of the Roman patriots." Although Matthews has not written a book of the "It can't happen here" type, one is strongly aware, page by page, that the forces making for Fascism are not restricted to Italy, nor to the Axis countries, but are in existence, potentially, throughout the Occidental world—a fact seriously to be reckoned with in any postwar demobilization. Not since Herman Heller's pioneering work, *Europa und der Fascismus*, appeared in 1929, has the universal applicability of Fascist doctrine been stated as precisely as well as subtly. Whether or not the reader's understanding of Fascism as an Italian or world movement has gained by Matthews' bringing in "the Lindbergh's and the Wheeler's" on the very last page of his book, may be questioned. In any event, American students of Fascism are fortunate in possessing this succinct first-hand account of an important chapter in modern Italian history, and the Italian people are fortunate in having, during one of their most difficult hours, an interpreter such as Matthews, who, in the dedication of his book, sets down "love of Italy and the Italians and hate of Fascism" as pivots of his thinking.—FRITZ ERMARTH.

An approach to a solution of the Indian dilemma is offered by N. Gangulee, formerly professor at the University of Calcutta and author of several books on Indian problems, in his *Constituent Assembly for India* (London: George Unwin and Allen; New York: W. W. Norton, pp. 304, $5.00). Professor Gangulee first discusses factually the constituent assembles of modern times, from the precursors of our own Constitutional Convention to the framing of the recent charters of the Soviet Union and the Spanish Republic. He then finds in the opposition of the Indian National Congress to the federal plan of the Government of India Act, 1935, a partial justification for his plea that India be allowed "freedom to

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achieve freedom." An analysis of India's political, economic, and social ills provides further support. Yet, in order that this freedom shall be the preface to an orderly assemblage of those most qualified to guide the construction of a constitution, the author proposes conciliatory steps as between Britain and India, and among the diverse elements of India itself. While this book is special pleading, it is of so temperate a nature that it merits examination by those who would know more about this possible solution.—HILTON P. GOSS.

Under date of June, 1943, the Prime Minister's Department of the Commonwealth of Australia issued *The Federal Guide; A Handbook on the Organization and Functions of Commonwealth and Special War-Time Authorities* (pp. 200). It is designed as a reference book for the Australian services and others concerned, and it is hoped that annual revisions may be issued. About half of the volume is devoted to the departments of state and their subordinate agencies. Under each department and agency is given the address, the names of the principal officials, and usually a brief statement of functions. This main section is followed by a title index to the acts administered by the various departments. This is followed by a section of 75 pages devoted to the wartime boards, committees, etc. At the end is an index to the functions and activities of the departments, and another to the names of the officials lists. In view of our close relationships with Australia in the war effort, this guide is more than welcome, and it should be an incentive to the authorities of the other Dominions to prepare and issue similar current administrative guides.—J. B. CHILDS.

British attempts to assure an equitable distribution of consumer goods in wartime are described in detail by Jules Backman in his convenient little compendium, *Rationing and Price Control in Great Britain* (Brookings Institution, pp. iv, 68, $0.50). The study shows how rationing, price-control, wage-control, subsidies, bulk purchasing, and taxation are interwoven; how each measure leads always to another, so that the pattern of control is never complete; how sudden rationing of some new article has to be followed by negotiations with the trade; how advisory committees are used, both trade by trade and locality by locality; and how the prevention of black markets depends on public conviction that the policy is fair to all. In Britain, unlike the United States and Canada, each commodity is controlled vertically instead of there being a single over-all horizontal control, speedy action being preferred to coördination.—W. HARDY WICKWAR.

In his *Political Meeting Places of the Greeks* (Johns Hopkins Press, pp. xix, 308, $5.00), Willam A. McDonald has provided the specialist a very usable manual. In systematic progression are considered the archeological

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and architectural aspects of the assembly places in Crete and in Homeric and post-Homeric Greece. The descriptive reports of the remains is supplemented with relevant literary and epigraphical evidence and with judicious commentary. The whole is rounded by nineteen plates, gathered together at the end of the volume. The author attends strictly to his specialty; thus this volume, which is No. 34 of the Johns Hopkins University Studies in Archaeology, gives little directly to the student of government; but it does provide him with essential material for interpretation of the political ideas and institutions of the ancient Greeks. Students of political ecology will welcome the careful work of Professor McDonald.—ALLAN F. SAUNDERS.

INTERNATIONAL LAW AND RELATIONS

The Annals of the American Academy of Political and Social Science for July, 1943, presents the addresses delivered under the general title of "The United Nations and the Future" at the forty-seventh annual meeting of the Academy, held last April 9 and 10 at Philadelphia. Seventeen lectures by prominent American and foreign authorities are included, some of which concern themselves primarily with the organization and policies of the United Nations, while others discuss postwar problems on a broader scale, taking up such subjects as the future of trade and the status of the British Commonwealth. Two of the addresses (by Count Czernin and Mr. Nicholas Mirkovich) stress the need for a United Nations Council now and for a more explicit statement of the aims and policies of the United Nations than the Atlantic Charter has provided. On the other hand, Senator Pepper feels that it is too soon to begin the formation of a new organization and that it is enough to have the commitments of the powers to participation in postwar peace machinery. Several of the speakers (notably Mr. William Agar and Mr. Clark Eichelberger) express concern over the attitude to be taken by the government of the United States toward the new order. Some of those who spoke for the smaller members of the United Nations (Mr. Oskar Halecki for Poland and Mr. Edvard Hambro for Norway) were apprehensive as to the future of regions in which their countries are located. On the whole, the speakers were well chosen and the subjects authoritatively handled. It is the opinion of the reviewer, however, that an even better program would have been provided had there been one or more spokesmen for Russia, the only one of the four large powers belonging to the United Nations whose point of view was overlooked.—NORMAN L. HILL.

Many books on colonial problems deal in minute detail with some particular dependency, and therefore fail to show the similarity which often exists between the problems that confront colonial governments in the same part of the world. Mr. J. S. Furnivall has avoided this mistake in his

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Educational Progress in Southeast Asia (Institute of Pacific Relations, pp. xii, 186, $2.00). He first surveys the development of education in Burma, Malaya, the Netherlands East Indies, Indo-China, the Philippines, Thailand, and Formosa from about 1800 to 1940. Educational policies, the types of schools, the degree of popular response, and the present situation are clearly and succinctly presented. This is followed by a survey of educational problems in Southeast Asia, and some suggestions for improvements. There is a supplement on training for native self-rule by Mr. Bruno Lasker, and an interesting appendix on the Japanese system of education in Formosa by Mr. A. J. Grajdanzev. The conclusions which emerge are that the educational problems were broadly the same, and that there was a great deal of similarity between the general policies adopted by the American, British, Dutch, French, and Thai governments. While there were varying degrees of success, all of them substantially failed to achieve their goals. The main objective was to diffuse primary instruction; but no goverment was able to provide schooling for more than a fraction of the children. Moreover, a high percentage did not remain long enough to attain permanent literacy. The attempts to popularize technical and vocational education were a very qualified success; and in all the countries under review there was an over-production of clerks and lawyers for whom there was no employment. The book is a depressing story of excellent intentions and very disappointing results.—LENNOX A. MILLS.

G. H. C. Hart's *Toward Economic Democracy in the Netherlands Indies* (The Netherlands and the Netherlands Indies Council of the Institute of Pacific Relations, pp. 123) is designed to acquaint readers favorably with the Dutch in the Indies, especially their "record of idealistic, business-like, and devoted collaboration of colored and white races." Written in simple, and occasionally striking, language, it appears to be an honest account of mistakes, unsolved problems, and expedients balanced against a record of encouraging developments in economic and political democracy and of successful ventures in government participation in economic activities such as resettlement, elimination of chronic indebtedness, small industries, and rubber and sugar cartels. Hart insists that the progressive failure of laissez-faire relentlessly extended state control of economic enterprise, fortunately under democratic processes which took account of native institutions and mores. A result was a growing partnership between Dutchmen and Indonesian natives. As a former official in the Indies and as chairman of the Netherlands Indies board in America, Hart has the training and incentive to write this book. He succeeds in his purpose, for most lay readers will feel acquainted with the Indies, probably seek more information about them, and finally, despite all admitted shortcomings,

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believe that the Japanese advance across the Indies destroyed an unusually humane, enlightened, and progressive government.—GARLAND DOWNUM.

Inter-American Affairs, 1942 (Columbia University Press, pp. 252, $3.00) is the second volume in a series of annual surveys under the able editorship of Arthur P. Whitaker. Most of the contributors to this volume are new; two, however, assisted in preparation of the 1941 survey. The work is divided into several sections. In the political and diplomatic field, the editor discusses the year's developments in regard to what is called the "Inter-American System," and this section is exceptionally well handled and written. Sub-headings divide the discussion into fields such as "Subversive Activities and Synarchism," "Latin American States and the War," and "Inter-American Coöperation." In the political field, Canada is treated separately, and this is also done in the portion of the work dealing with industry, commerce, and finance—in fact, in spite of the need to offer a treatment of all American affairs, it seems clear that Canada-United States relationships form one distinct field at present, and Latin America and the United States another, whatever may be the trends in the future. In addition to the necessary conventional survey of economic progress, there are several sections which deal with social and cultural trends. While space allotted to all of these major subdivisions is nearly equal, it is quite evident that relationships between the United States and Latin America in the financial and commercial fields have developed a complexity and significance far surpassing achievements as yet made in cultural and social coöperation. This reviewer believes, also, that success in the latter line is probably somewhat less than official statements would indicate. Statistical appendices, a chronology of important events of the year, and an adequate index add to the value of a survey which will find a place on the book-shelves of all persons concerned with keeping up with rapidly-moving developments in Latin American and United States relationships under the pressure of war.—DONALD ROWLAND.

The newly revised edition of *Geography of Latin America* (Prentice-Hall, Inc., pp. 566, $4.50), by Fred A. Carlson, brings up to date a text first published in 1936, and one which has been widely used at appropriate school levels. There is an emphasis, in both editions, on the effect of geographic features upon human history and progress, and this makes the work of definite value where what might be called a "social science" approach to the study of this area of the world is desired. In the revised edition, new geographical information made available by recent studies has been incorporated, and in addition chapters have been written giving data on political and social background. The specialist in the field will have some criticism of these latter chapters as to some conclusions and

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inferences reached. For example, in the section on "Political Evolution," historians would not accept the statement that "closing of overland routes to the East by Mohammedan powers" largely contributed to the discovery of the Americas, nor the inference that Spain and Portugal lived up to the terms of the Treaty of Tordesillas without serious strife. It is hardly correct to state that Spain "ceded Cuba and Porto Rico" to the United States in 1898, and Simon Bolivar did not officially favor the establishment of monarchies in Latin America. Several other similar inferences could be mentioned; these points do not, however, counterbalance the excellent survey in the geographic field, which, after all, is the real purpose of the work.—DONALD ROWLAND.

In *The Progress of Pan-Americanism—A Historical Survey of Latin-American Opinion* (Public Affairs Press, pp. 418), translated and edited by T. H. Reynolds, an attempt is made to give a cross-section of Latin-American, together with some Anglo-American, attitudes toward Pan-Americanism. The subtitle is somewhat misleading in that the survey of opinion is not limited to Latin America, nor is there much history in the survey. It is a collection of statements, articles, and addresses of statesmen, journalists, scholars, and others, most of which deal with inter-American relations of recent years. Some valuable statistics on foreign trade are included. Various views are given, but the preponderance of opinion seems to be that the Good Neighbor policy, which is given considerable space, is really working and that Pan-Americanism is making good progress. Unfortunately, there is neither a table of contents nor an index. The organization of the book into parts, chapters, and sections of chapters is not as systematic as it might be. One item appears at two different places (pp. 188 and 233). More information about a number of the sources would have been helpful. Despite these inadequacies, students of inter-American relations will find the volume useful and much of the material interesting.—WILLARD H. SMITH.

For the third British occupation of Cyrenaica, the military legislation, being proclamations nos. 1–10, issued on November 11, 1942, by General B. L. Montgomery, commanding the Eighth Army, has been printed by the Printing and Stationery Services, Middle East Forces, in a pamphlet of 44 pages. The first proclamation establishes the British occupation, the second deals with war crimes, the third sets up military courts, the fourth establishes the Cyrenaica police force, the fifth deals with the custody of enemy property, the sixth provides for the delegation of powers to political officers, the seventh relates to currency, the eighth concerns land transactions, the ninth ordains a moratorium, and the tenth provides for Cyrenaica police discipline. Military legislation for Tripolitania, being proclamations nos. 1–11, issued on December 15, 1942, General B. L.

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Montgomery, commanding the Eighth Army, has been similarly printed in a pamphlet of 44 pages. In addition to the first ten proclamations covering the same subject-matter as those for Cyrenaica, there is an eleventh proclamation dealing with the detention of suspected persons. Experience derived from the administration under the military legislation in Cyrenaica and Tripolitania will doubtless be of importance in determining the formula to be used elsewhere.—J. B. CHILDS.

POLITICAL THEORY AND MISCELLANEOUS

Education and the United Nations (American Council on Public Affairs, pp. 112, paper $1.00) is a brief book making an excellent contribution to thought on international educational activities which will be increasingly a part of the future policies of the United Nations. It takes the form of a report from a joint commission appointed late in 1941 by the Council for Education in World Citizenship and the London National Assembly. The former is composed of representatives appointed by all the British national associations, local educational authorities, teachers, and other educational bodies; Dr. Gilbert Murray is chairman. The London International Assembly was formed in September, 1914, "to serve the common cause of all those nations that are resisting aggression, by providing greater opportunities for the people of Great Britain and of each of the allied and associated nations (a) to understand more fully each other's history, economic development, institutions, and national aspirations, and (b) to consider the principles of postwar policy and the application of those principles to the problems of national and international affairs." From time to time, educational proposals are presented by the Assembly to the governments of the United Nations. The president of the organization is Viscount Robert Cecil, and its other general officers come from five different flags. For several years, both organizations, through their committees, have made an intensive study of educational conditions in the Nazi occupied countries and elsewhere. The present survey briefly covers Belgium, Czechoslovakia, France, Greece, Luxembourg, The Netherlands, Norway, Poland, Russia, Yugoslavia, the Far East, and other areas. It describes the enormous physical damage done by the deliberate destruction of school, college, and university buildings and equipment, as, for example, the dozen buildings and the library with its thousands of literary treasures at the University of Louvain—the second time that German fury has wrecked this institution in one brief generation. The survey pictures also the damage done by the Nazis in substituting wherever they could, and at all levels, propaganda for education, in destroying the teaching profession, and in closing schools entirely. The latter part of the report is devoted to recommendations for helping to reëducate the peoples of former enemy countries. It is urged that the United Nations set up now

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an international bureau staffed by leading educators from various countries and appoint as chief executive a high commissioner. The group should be ready for work the minute Allied occupation begins. This plan recognizes the fact that reëducation in former Nazi countries will be necessary for world peace, and that no one country could or should undertake the stupendous task. In some cases, education will have to be financed from the treasury of the United Nations. The report was presented to the Assembly in December, 1942, and was adopted by it in January, 1943. A few weeks later, it was adopted by the Council also, and commended to the governments of the United Nations. The Commission was authorized to continue its work. This report should be studied closely by educators, by international statesmen everywhere, and, of course, by the lay public. The next report should be eagerly awaited. *War and Education* (Boston: Porter Sargent, pp. 504, $4.00), by Porter Sargent, is a large work written by the author of the very useful annual guide, *Handbook of American Private Schools*, and other educational works. The book is throughout a vigorous indictment of almost every phase of education in the Western democracies, particularly in the United States. Educational philosophy, goals, organization, activities, and results in this country are severely condemned all the way up from kindergarten to university. Some of the unpardonable sins at the lower levels are the teaching of facts and beliefs which have little relation to the actual life of the pupils, and the medieval mechanization to which they are subjected. At the higher levels, the author finds lack of unification or correlation among curricular offerings, the presentation of those offerings by dull subject-centered professors, and the failure of higher institutions to produce adequate leadership for the fight against war and other evils. More than half of the volume is composed of quotations, from hundreds of works, which analyze, fairly or unfairly, the social evils of Western society. These bibliographical notes and suggestions are excellent. Teachers and educational administrators frankly admit the existence, to one degree or another, of all the evils of which the author complains. But they have daily, grinding experience with trying to educate human materials—good, bad and indifferent—under democratic conditions, and they could wish that Mr. Sargent had given some concrete, helpful suggestions as to the way out. Such suggestions are almost entirely lacking.—Bessie C. Randolph.

At a time when liberalism has succumbed to tyranny in a large portion of the world, and when liberal education is under heavy assault by domestic critics who can find no practical value in education for freedom, the American Council of Learned Societies has rendered a valuable service both to education and to democracy by sponsoring an inquiry entitled *Liberal Education Re-examined: Its Rôle in a Democracy* (Harper, pp. xiv,

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134, $2.00). The book embodies the conclusions reached by a committee appointed by the Council consisting of Theodore M. Greene, chairman, Charles C. Fries, Henry M. Wriston, and William Dighton. As an expression of faith both in American democracy and in education as "the enhancement of human dignity and all that this implies—freedom from tyranny, opportunity for development and growth, enrichment of life, moral and spiritual maturity" (p. 30), it is a forceful statement of spiritual convictions that we are too often in danger of losing through forgetfulness. Only cursory attention, however, is given by the authors to those factors which have undermined the liberal faith, and their defense of liberalism is weakened by their failure to take these sufficiently into account. The authors waver, moreover, between a conception of freedom as the embodiment of objective truth and as a method of arriving at an ever-changing truth. Thus, it is asserted, on the one hand, that "truth is the value upon which liberal education must focus its chief attention if it is to preserve its integrity" (p. 38) and, on the other hand, that what students need is not "a neat and complete synthesis of all human knowledge [since] such a synthesis . . . would be not only tyrannical but *dead* and *useless*, [but] what students need is discipline in the synthetic *method*" (p. 78, italics are the reviewer's). The value of a "synthetic method" that never arrives at a synthesis (truth) is questionable, particularly as the foundation for freedom. For, as Nicholas Berdyaev has declared, "freedom means not only freedom of choice, but choice itself." So fearful are the authors of the charge of indoctrination, even with respect to truth, that their defense of liberalism turns out to be more of a defense of the liberal method than of the truths and values upon which the perpetuation of that method inevitably depends.—JOHN H. HALLOWELL.

Frank P. Chambers, Christina Phelps Grant, and Charles C. Bayley have collaborated in writing *This Age of Conflict, 1914–1943* (Harcourt, Brace, pp. xviii, 856, xciii, $5.50), which, as the subtitle suggests, is presented as a contemporary world history of general interest. The book is divided into four parts: (1) "The First World War" (5 chaps.); (2) "The Twenties: The Period of Settlement" (16 chaps.); (3) "The Thirties: The Period of Crisis" (16 chaps.); and, finally, (4) "The Second World War" (1 chap.). There are adequate notes, although their usefulness is lessened by being assembled following the text at the end. A helpful series of cross-references appears throughout the volume. There are a short (and quite unnecessary) glossary, a general bibliography with helpful comment for the lay reader, illustrative maps, and a suitable appendix and index. The treatment is, on the whole, chronological and primarily by countries and regions. Each chapter is meant to be a "self-contained unit." This is a carefully prepared, well written, and well edited volume whose greatest

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service, no doubt, is that it treats the two world wars and the intervening years as a "historic whole," a time of "accumulating disequilibrium," a contemporary Thirty Years War. The authors have obviously tried hard to achieve synthesis and integration—a difficult task in an undertaking of world scope. To this reviewer, it appeared that the thread of correlation became thinner as the chronology progressed into the last decade, due perhaps to the narrowing historical perspective. Despite the authors' assertion that they have attempted to consider whatever has had "a bearing on the international scene," the volume deals largely with Europe. Whereas five chapters (135 pp.) are devoted to the Balkans and the Near East, only two (36 pp.) are given to the Far East and, again, two (41 pp.) to the Americas. But until some absolute standard of equilibrium in world history is discovered, each reader, according to his likes and interests, may criticize a work of this type on the ground of lack of proper (to him) balance. This over-balance as, for example, in the case of the Near East, the authors justify on the ground that the general literature available is "less accessible or suffers from propaganda." By and large, however, the work is well done and will be of particular interest to students of contemporary history, international relations, and, to a lesser degree, comparative government.—IVAN M. STONE.

Instructors in political theory will welcome John Hallowell's recent study, *The Decline of Liberalism as an Ideology* (University of California Press, pp. 146, $1.50), for supplementary assignment in advanced courses. In his subtitle, the author indicates that he is making "particular reference to German politico-legal thought," but nearly half the volume is an excellent summary of early liberal theory. This is defined as "integral liberalism," to contrast it with the "formal liberalism" of more recent writers. To the integral liberals, the political order was based upon the "absolute moral worth of each individual." In the liberal system, law was viewed as eternal, universal, and rational, guaranteeing the maximum freedom for the individual from arbitrary, personal power, and placing substantive limitations on interest and will, both of the state and of man. With conscience keeping watch to insure obedience, man's conviction of the immutability of natural law provided the link between individual interest and social order. This type of reasoning was in keeping with the intellectual atmosphere of the early modern period; the universe was viewed as a rational, atomistic, mechanical entity, responding to immutable laws. From the thinking of this *milieu* to the formalism of recent theory, Hallowell follows the decay of liberalism in German thought. The effect of Romanticism, the development of positivism and *Realpolitik*, the impact of scientific theories of physics and biology, and the influence of scientific methodology are woven into the story of liberalist disintegra-

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tion. Through the Romanticists, the Historical School, the Positivists, the progressive decline of genuine liberalism is traced, until, with the Neo-Kantians and the Neo-Hegelians, German theorists stood beyond good and evil. Every state was a *Rechtstaat;* law was merely a norm, or was equated with force. The formal liberalism encountered by Hitler had no substance or content; it had lost its moral convictions. In divesting itself of ethical judgment, it had only prepared the German mind for unbridled tyranny. Hallowell confines himself to critical analysis and interpretation; he makes few judgments beyond those affecting the logical inadequacy of formal liberalism. But the clarity of his insight and the coherence of his interpretation recommend this volume to all students of political theory.—ALFRED V. BOERNER.

The mass of crimination and recrimination that has been aimed at organized labor and its practices is surveyed in a cool and dispassionate manner by Joel Seidman in *Union Rights and Union Duties* (Harcourt, Brace, viii, 238, $2.50). Mr. Seidman is, on the whole, sympathetic with the aims and efforts of trade unions, yet his sympathy has not blinded him to the opportunities which organized labor has presented to its enemies. He recounts here enough of the less respectable activities of labor to show that such conduct presents a serious problem, but that, at the same time, it is not to be found in the major portions of the labor movement. The misconduct of labor does not occur, as is well shown, in a world inhabited by spotless employers and unsullied agencies of government. The evidence in support of the latter proposition is derived from the recent investigations of the La Follette Committee of the Senate, the main burden of which is succinctly summarized in the present volume. The responsibilities of the union toward its members, toward employers, and toward the public come in for scrutiny. The manner in which the law regulates union conduct is summarized. The recent legislation, both of the nation and of the states, is briefly stated. Finally there is an analysis of current proposals for controlling union activity. Incorporation is examined and found unnecessary. Licensing and public registration depend on more specific terms of the law. Other forms of control depend not only on labor's coöperation, but also on a reform in the conduct of the employers and the government. Mr. Seidman is fully aware of the significant change in the rôle that organized labor should play which flows from the fact of government support of unionism and the possibilities of power which derive from the closed shop. He advocates governmental review of membership restrictions by unions, and also of their disciplinary procedures. These are only two from a book that bristles with suggestions for changes. The comments are as enlightening on most other phases of contemporary unionism. In short, the volume is obviously the work of a man who has

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thought long and hard about one of the pressing issues of the day, and he has not hesitated to have his say. His say is a splendid and succinct discussion of the topic announced in the title.—CHARLES B. HAGAN.

The liberalism of the nineteenth century has in these recent times been too often held up to opprobrium as a doctrine and a movement essentially negative, and wrongly appropriating to itself the name of democracy. Too frequently are its positive contributions to the newer philosophy of democracy overlooked. For this reason, a study of a great liberal, such as Warren Staebler's *The Liberal Mind of John Morley* (Princeton University Press, for the University of Cincinnati, pp. viii, 221, $3.50) is of real significance at the present time. The author himself declares that the body of Morley's thought "exhibits startling pertinency to our own day and relates him more closely perhaps than any of the other Victorians of the twentieth century." There is a question, however, whether this particular study is as significant and as useful as it might have been in relating the liberalism of Morley to the cause of democracy at this particular moment of ideological warfare if the material had been handled analytically rather than chronologically. It is true that the constructive and permanent elements of liberalism, as well as some of its less constructive aspects, are all to be found in Mr. Staebler's presentation. The burden, however, of constructing Morley's philosophy of liberalism as a whole lies mainly upon the reader. Only in Chapter 5—"Private Life and Last Years; A Comparison and a Summary"—does the author furnish much help along these lines. And even here one misses, as one has missed in the preceding chapters, definitions of fundamental terms—democracy, liberal, liberalism, and the like. One lays down the book having learned much, very entertainingly told, about John Morley, his mind and his work, but with the feeling that a great opportunity has been missed, the opportunity, namely, to present, through the mind of one of its illustrious exponents, a systematic analysis and synthesis of nineteenth-century liberalism, and of its essential relationship to the twentieth-century philosophy of positive democracy.—ELLEN DEBORAH ELLIS.

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